Nos. 87-253, 87-431, 87-462, and 87-77

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

OTIS R. BOWEN, Secretary of Health and Human Services,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

CHAN KENDRICK, et al.,
Cross-Appellants,

—v.—

OTIS R. BOWEN, Secretary of Health and Human Services,
Cross-Appellee.

UNITED FAMILIES OF AMERICA,
Appellant,

—v.—

CHAN KENDRICK, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLEES' AND CROSS-APPELLANTS' BRIEF

BRUCE J. ENNIS, JR.
Ennis, Friedman & Bersoff
1200 17th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 775-8100

JANET BENSHOOF
(Counsel of Record)
LYNN M. PALTROW
DAWN JOHNSEN
NAN D. HUNTER
RACHAEL N. PINE
American Civil Liberties Union
Foundation
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

QUESTIONS PRESENTED

1. Whether the district court erred in holding that the Adolescent Family Life Act, 42 U.S.C. §§ 300z *et seq.*, which requires religious involvement in all programs, and which funds religious organizations to teach and counsel on sexuality issues, violates the Establishment Clause of the First Amendment.

2. Whether the district court erred in severing the statutory provisions that involve religious organizations in Adolescent Family Life Act programs, and in enjoining the funding of religious organizations, rather than invalidating the Adolescent Family Life Act in its entirety.

PARTIES

Defendant below, Otis R. Bowen, in his official capacity as Secretary of Health and Human Services, is Appellant herein. Defendant-Intervenors in the trial court were Sammie J. Bradley, Katherine R. Warner and United Families of America; United Families of America is Appellant-Intervenor herein. Plaintiffs below, Chan Kendrick, Reverend Robert E. Vaughn, Reverend Lawrence W. Buxton, Dr. Emmett W. Cocke, Jr., Shirley Pedler, Reverend Homer A. Goddard, Joyce Armstrong, John Roberts, and the American Jewish Congress are Appellees herein.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. THE LEGISLATION	2
B. THIS LAWSUIT	5
C. FACTS	6
1. Introduction	6
2. HHS Interpreted The Statute To Require Religious Involvement By All Grantees	7
a. Fulfilling The AFLA's Purpose, HHS Injected Religious Bias Into The Grant-Making Process	7
b. HHS Funding Decisions Ensured That Religions And Religious Viewpoints Would Be Advanced	9
i. OAPP Funded Secular Grantees To Use Religious Means To Achieve AFLA Goals	10
ii. AFLA Programs With A Distinctly Religious Slant Were Presented To Public School Students	12
iii. OAPP Funded Grantees To Build Upon Existing Religious Programs	13

PAGE

c. OAPP Condoned The Promotion Of Religious Doctrine 18

d. Grantees' Activities Were Governed By Religious Requirements..... 19

e. HHS And AFLA-Funded Programs Convey To The Public That The Government Supports Religion 22

f. The Values Promoted By The AFLA Are Of Core Theological Concern To Some Religions 24

g. The AFLA Promotes Certain Religious Denominations While Denigrating Others. 26

SUMMARY OF THE ARGUMENT 29

I. THE AFLA VIOLATES THE *LEMON* "EFFECTS" TEST BECAUSE IT IMPERMISSIBLY ADVANCES RELIGION..... 30

A. The AFLA Is Unconstitutional Because It Funds Specifically Religious Activity And Religious Institutions 32

B. The AFLA Is Unconstitutional Because It Lacks Any Statutory Safeguards..... 37

C. The AFLA Is Unconstitutional Because It Funds "Pervasively Sectarian" Organizations. 41

II. THE AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION 45

A. The Degree Of Sectarianism Of An Institution Must Be Assessed In Light Of Its Religious Tenets Governing The Aid At Issue..... 47

PAGE

B. The Nature Of The Aid Provided Under AFLA Grants Requires Close And Entangling Supervision..... 48

C. The AFLA Compromises The Integrity Of Both Government And Religion 50

D. The AFLA Creates Political Divisiveness..... 51

III. APPELLANTS' ALTERNATIVE THEORIES CANNOT OBSCURE THE FACT THAT THE AFLA ADVANCES RELIGION AND FOSTERS EXCESSIVE ENTANGLEMENT 53

A. Labeling The AFLA A "Social Welfare Program" Does Not Exempt It From Scrutiny Under The Establishment Clause..... 53

B. AFLA Funding Of Religious Institutions And Religious Activities Is Not Neutral 56

IV. THE ENTIRE AFLA MUST FALL DUE TO THE UNCONSTITUTIONAL RELIGIOUS INVOLVEMENT, AND THE STATUTE MAY NOT BE SEVERED 57

CONCLUSION 60

APPENDIX

Exhibit A, Adolescent Family Life Act, 42 U.S.C. §§ 300z to 300z-10..... 1a

Exhibit B, Adolescent Health Services and Pregnancy Prevention Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 ..... 28a

Exhibit C, Framework For This Court For Cases Involving Aid To Religious Institutions Decided Under The *Lemon* "Effects" Test 40a

PAGE

Exhibit D, Proposed Order Of The Adolescent Pregnancy Prevention And Pregnancy Services Board Adopting Rules, Wis. Stat. Ann. § 46.93 (West 1987), as amended by 1987 Wis. Act 27, § 863br 42a

TABLE OF AUTHORITIES

Cases

PAGE

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 35

Aguilar v. Felton, 473 U.S. 402 (1985).....29, 32, 46, 48

Alaska Airlines v. Brock, 107 S. Ct. 1476 (1987) 58

Board of Educ. v. Allen, 392 U.S. 236 (1968) 37, 41a

Bradfield v. Roberts, 175 U.S. 291 (1899) 54, 55

City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987)..... 58

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) 5-6, 29, 32, 37, 38, 51, 57, 40a, 41a

Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).....42, 41a

Community Council v. Jordan, 102 Ariz. 448, 432 P.2d 460 (1967) 54

Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980) 51

Edwards v. Aguillard, 96 L.Ed.2d 510 (1987) 34, 35, 57

El Paso Northeastern Ry. v. Gutierrez, 215 U.S. 87 (1909)..... 59

Epperson v. Arkansas, 393 U.S. 97 (1968) 34, 57

Everson v. Board of Educ., 330 U.S. 1 (1947).....30, 32, 38, 54, 56, 41a

Field v. Clark, 143 U.S. 649 (1892) 58

Flast v. Cohen, 392 U.S. 83 (1968)..... 45

PAGE

Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) 29, 33, 40, 42, 43-44, 40a

Harris v. McRae, 448 U.S. 297 (1980) 36

Hill v. Wallace, 259 U.S. 44 (1922) 58, 59

Hunt v. McNair, 413 U.S. 734 (1973) 33, 39, 42, 46, 49, 55, 41a

Huntington v. Worthen, 120 U.S. 97 (1887) 58

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 29, 35, 46

Larson v. Valente, 456 U.S. 228 (1982) 46, 57

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) 32, 38, 40a, 41a

Lynch v. Donnelly, 465 U.S. 668 (1984) 29, 44, 51, 52, 53

Marburger v. Public Funds for Pub. Schools, 417 U.S. 961 (1974) 40a

Marsh v. Chambers, 463 U.S. 783 (1983) 54

Meek v. Pittenger, 421 U.S. 349 (1975) 33, 40, 44, 45, 46, 49, 51, 59, 40a

Meek v. Pittenger, 374 F. Supp. 639 (E.D. Pa. 1974) (three-judge court) 45

Mueller v. Allen, 463 U.S. 388 (1983) 52, 55, 41a

Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) 38, 39, 41-42, 46, 49, 50, 52, 55, 56, 41a

Sloan v. Lemon, 413 U.S. 825 (1973) 59

Stone v. Graham, 449 U.S. 39 (1980) 29

PAGE

Tilton v. Richardson, 403 U.S. 672 (1971) 32, 38, 39, 42, 47, 49, 55, 40a, 41a

United States v. Kahane, 396 F. Supp. 687 (S.D.N.Y.), *modified on other grounds*, 527 F.2d 492 (2d Cir. 1975) 26

United States v. Salerno, 95 L.Ed.2d 697 (1987) 33

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 36, 52

Wilder v. Bernstein, 645 F. Supp. 1291 (S.D.N.Y. 1986) 54

Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) 54

Wisconsin v. Yoder, 406 U.S. 205 (1972) 57

Witters v. Washington Dept. of Servs. for the Blind, 106 S. Ct. 748 (1986) 41a

Wolman v. Walter, 433 U.S. 229 (1977) 38, 46, 49, 40a, 41a

Constitution, Statutes, Legislative Materials and Regulations

U.S. Const. amend. I ..... *passim*

Adolescent Family Life Act, 42 U.S.C. §§ 300z to 330z-10 ..... *passim*

§ 300z(a)(8)(A) 2, 3
§ 300z(a)(8)(B) 2, 3
§ 300z(a)(10)(A) 19
§ 300z(a)(10)(C) 3
§ 300z-1(a)(4) 4
§ 300z-1(a)(8) 4
§ 300z-2(a) 3
§ 300z-3(b)(1) 20
§ 300z-4(c)(1) 9, 45
§ 300z-5(a)(21)(B) 3
§ 300z-5(22) 5
§ 300z-10(a) 4, 19

PAGE

Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 (repealed Oct. 1, 1981) 2, 3
§ 601(a)(5) 3
§ 601(a)(7) 3
§ 601(a)(22) 5

Adult Education Act, 20 U.S.C. § 1210 40

Education Act of 1965, 20 U.S.C. § 3862(c)(2) 40

Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241-1(a)(1)(B),(a)(4) 40

Higher Education Act of 1965, 20 U.S.C. §§ 1021(c), 1062(b)(1), 1069c(1), 1070e-1(c)(2)(A)(ii), 1132g-3(c)(2), 1132i(c), 1134e(g) 40

Retired Senior Volunteer Program, 42 U.S.C. § 5401(a)(2) 40

Vocational Educational Act, 20 U.S.C. § 27 40

Work-Study Program, 42 U.S.C. § 2753(b)(2)(C) 40

S. Rep. No. 161, 97th Cong., 1st Sess. (1981) 2, 4

S. Rep. No. 496, 98th Cong., 2d Sess. (1984) 4

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 1010 4

S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981) 1

S. 1090, 97th Cong., 1st Sess. § 1911 (June 24, 1981) .. 4

47 Fed. Reg. 8685 (1982) 52

PAGE

48 Fed. Reg. 2917 (1983) 52

Wis. Stat. Ann. § 46.93 (W[illegible]987), as amended by 1987 Wis. Act 27, § 863br 47, 42a

Other Authorities

Brief for the Government at 47, *Aguilar v. Felton*, 473 U.S. 402 (1985) 48

The Code of Canon Law (J. Coriden, et al., ed. 1985) . 36-37

Government of the District of Columbia Annual Reports of the Commissioners, 1874-1941, Report of Board of Health (1896, 1897) 55

M. Howe, *The Garden and The Wilderness* (1967) 50

J. Huels, *The Pastoral Companion* (1986) 37

Moore, *Adolescent Parents: Federal Programs and Policies* (Summer 1983) 58

National Catholic Rep., Feb. 10, 1984, at 20 36

N.Y. Times, June 25, 1984, § IV, at 13 36

Pope Paul VI, encyc. letter *Humanae Vitae: Acts Apostolicae Sedis* (1968), *reprinted in The Papal Encyclicals, 1958-1981* (C. Ihm, ed. 1981) 25

Potter, "Arlington Bishop Stonewalls on Propriety of Sex-Ed Course," The Wanderer, Apr. 11, 1985 51

INTRODUCTION

The Adolescent Family Life Act is without question a law respecting an establishment of religion. In enacting the Adolescent Family Life Act ("AFLA"), Title XX of the Public Health Service Act, 42 U.S.C. §§ 300z to 300z-10, Congress deliberately chose to fund religious instruction on sexuality. Religious organizations are called upon to participate in AFLA programs in their traditional role as transmittors of religious values. Pursuant to the Act, AFLA programs convey to young people a message—as one enthusiastic recipient of AFLA services explained it—that "the focus of sexuality [is] shifted to the total person in Christ" and that students are to "travel life's highway with God, as their copilot!" J.A. 427.

The AFLA is both intended and perceived to convey a message of government endorsement of religion and certain religious beliefs. The AFLA endorses religion by 1) requiring the involvement of religious organizations in all funded programs; 2) funding religious organizations to provide sex education and reproductive health care services in a manner that promotes theological beliefs; 3) funding only those religious groups that hold certain theological beliefs about sexuality issues, including abortion; and 4) funding programs likely to promote religion with no statutory assurances that the funds will be used for purely secular purposes.

The district court's judgment of unconstitutionality[1] rests on the overwhelming showing made by plaintiffs, rebutted by neither the government nor intervenors, that, in enacting the AFLA, Congress undertook to fund a religious crusade against adolescent "promiscuity" and abortion.[2] The court's opinion in no way threatens, as the government and intervenor contend, the ability of religious organizations to operate non-

---

1 All citations to the district court's opinion will be to the Appendix of appellant's Jurisdictional Statement in the form "J.S. App. _____." Cites to the Joint Appendix are in the form "J.A. _____." Cites to other parts of the record are by the record number, in the form "R. _____." "R. 155, A., _____, _____" refers to a volume of the Appendix to plaintiffs' Statement of Material Facts.

2 The original draft AFLA bill spoke in terms of discouraging "adolescent promiscuity" and promoting "chastity." S. 1090, 97th Cong., 1st Sess. § 1901(a) (Apr. 30, 1981).

ideological and non-sectarian programs at government expense under properly limited statutes respectful of the Constitution.

Notwithstanding the elaborate and novel legal arguments made by appellants, this case requires the Court only to say what should have been too plain for argument—that under our Constitution religious instruction and indoctrination are not within the scope of Congress' power to tax and spend for the general welfare.

STATEMENT OF THE CASE

A. THE LEGISLATION

Congress passed the Adolescent Family Life Act to replace the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. No. 95-626, tit. VI, 92 Stat. 3551, 3595-3601 ("Title VI"). *See* S. Rep. No. 161, 97th Cong., 1st Sess. 1 (1981) ("Senate Rep."). The AFLA's sponsors were unhappy with the lack of "values"-teaching in Title VI programs and remedied this by "*promoting* the involvement of religious organizations." *See* Senate Rep. at 7, 15-16 (emphasis added). Congress specifically included religious groups in order to inject religious values and the power of religion into AFLA programs. Congress recognized that religion could do what government could not, because religion does not suffer from "the limitations of Government in dealing with a problem that has complex moral and social dimensions." *Id.* at 15-16. Moreover, this government funding of religion was intended to be highly visible; the AFLA is a demonstration project designed to create models for other programs to follow, and it is to be "promoted and publicized." *Id.* at 16.

The AFLA, in contrast to Title VI,[3] requires the involvement of religious organizations in funded programs,[4] either as direct recipients of federal funds and/or in cooperation with secular grantees, and inserts the words "religious and charitable organizations" in four separate places. §§ 300z(a)(8)(A), (B); 300z(a)(10)(C); 300z-2(a); 300z-5(a)(21)(B).[5] For example, section 601(a)(5) of Title VI stated "the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services." 92 Stat. 3595. The corresponding section of the AFLA states "the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and . . . are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, *religious* and charitable organizations, voluntary associations, and other groups . . . ." § 300z(a)(8)(A) to (B) (emphasis added).[6]

The AFLA includes two grant requirements not present in Title VI that mandate religious involvement in *all* AFLA programs. First, "[d]emonstration projects *shall* . . . make use of support systems such as other family members, friends, *religious* and charitable organizations, and voluntary associations." § 300z-2(a) (emphasis added). Second, every application for AFLA funds must include "a description of how the applicant will, as appropriate in the provision of services, involve *religious* and charitable organizations, voluntary associations, and other groups. . . ." § 300z-5(a)(21)(B) (emphasis added).[7] Moreover, unlike other federal statutes contemplating aid to religious institutions, the AFLA contains no provision to ensure that funds will be used only for secular purposes.

---

3 The AFLA is attached hereto as Appendix A; its predecessor statute "Title VI" is attached hereto as Appendix B.

4 Appellants have pointed to no other federal statute that expressly *requires* the involvement of religious organizations as such in its funded programs.

5 As the district court found: "The legislative history of these provisions shows without doubt that Congress intended religious organizations to participate in these programs as grantees and as paid or unpaid participants in grants awarded to other organizations." J.S. App. 28a. Moreover, the court recognized that "Title VI was amended to permit religious organizations to be involved in AFLA programs." J.S. App. 22a.

6 The AFLA also includes a new provision stating that government services under the Act "should *emphasize* the provision of support by other family members, *religious* and charitable organizations, voluntary associations, and other groups . . . ." § 300z(a)(10)(C) (emphasis added). *Compare* Title VI, § 601(a)(7), 92 Stat. 3595.

7 The "as appropriate" language was not intended to make involvement of religious groups optional; grantees do not have a choice about whether to involve religious organizations. Rather, it affords discretion to grantees to decide *how* to use religious guidance. This section was interpreted as being a mandatory grant requirement both by the district court, J.S. App.

The AFLA also differs from Title VI by making instruction and indoctrination of certain values concerning sexuality a major component of the Act. § 300z-1(a)(8).[8] Seven of the seventeen listed AFLA care and prevention services explicitly involve education and counseling, and two involve activities intimately related to education and counseling—outreach and planning services. J.S. App. 5a. In fact, with the exception of pregnancy testing, child care and transportation services, all of the AFLA care and prevention services involve some form of teaching, referral, or counseling services. *See* § 300z-1(a)(4).

Finally, the AFLA seeks "to encourage adolescents to bring their babies to term," Senate Rep. at 20, and to promote adoption, while discouraging abortion. The AFLA imposes the following abortion restriction on all grantees:

> Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; *and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.*

§ 300z-10(a) (emphasis added).[9]

40a, and by Congress in its 1984 reauthorization of the AFLA, *see* S. Rep. No. 496, 98th Cong., 2d Sess. 9-10 (1984).

8 Under Title VI there was no separate funding for "prevention services," which under the AFLA include educational programs "to prevent adolescent sexual relations," § 300z-1(a)(8) and the Title VI programs contained no content restrictions.

9 Contrary to the district court's interpretation, J.S. App. 14a-15a, the legislative history of the abortion prohibition makes clear that Congress intended both to restrict abortion speech in AFLA programs and to impose eligibility restrictions on organizations that can be construed as "promoting" abortion even with private funds. *See* Senate Rep. at 20; S. 1090, 97th Cong., 1st Sess. § 1911 (June 24, 1981) (R. 185, Supp. A., 124-25) (draft preceding one adopted); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 816-17 (1981), *reprinted in* 1981 U.S. Code Cong. & Admin. News 1010, 1178-79. In

B. THIS LAWSUIT

This action seeking declaratory and injunctive relief was filed on October 26, 1983 in the United States District Court for the District of Columbia, challenging the constitutionality of the AFLA on the grounds that it violated the religion clauses of the Constitution. Plaintiffs include federal taxpayers, four Protestant ministers and the American Jewish Congress.[10]

Plaintiffs do not disagree with the government's description of the proceedings in this case. The government, however, mischaracterizes the district court's opinion on the cross motions for summary judgment, so it is necessary to restate briefly its holdings.

The district court applied the now well-settled three-part test for Establishment Clause violations. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court found that the AFLA has a valid secular purpose[11] and thus satisfied the first *Lemon* prong. The court held that the AFLA failed the second, "primary effect," prong of the *Lemon* test because its use of religious organizations for indoctrination was clear from the face of the Act, and the AFLA has "the direct and immediate effect of advancing religion." J.S. App. 23a (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S.

---

contrast to the AFLA restrictions, Title VI required counseling and referrals on all pregnancy options, including abortion. § 601(a)(22), 92 Stat. 3600. Finally, the AFLA added the requirement of parental notification and consent for minors requesting specified services, except if it is believed that the parents are attempting to compel the minor to have an abortion. § 300z-5(22).

10 The religious plaintiffs alleged injury not only as taxpayers but also to their religious ministries: Because of their denominations' theological positions on abortion, they are not eligible for AFLA grants, yet religious organizations with beliefs antithetical to theirs receive AFLA funds which enable them to promote their beliefs. The American Jewish Congress sued on behalf of its members. R. 6.

11 In so holding, however, the court noted that under prior precedent, a statute satisfies the purpose prong as long as it has "some" valid secular purpose, "[e]ven when the benefits to religion are substantial, and motivation to advance or benefit religion is apparent." J.S. App. 17a. The court emphasized three times that although the AFLA met this test, it did so because it was not "motivated *wholly* by religious considerations." J.S. App. 20a, 21a, 22a (emphasis in original).

756, 783 n.39 (1973)). The court buttressed this conclusion by applying three factors referred to by this Court as independent indicia of "primary effect," *see* J.S. App. 25a-27a, and found that the AFLA failed each one of these tests.

First, by involving religious organizations in the value-laden enterprise of discouraging premarital sex and abortion, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." *Id.* at 30a. Second, "the statutory scheme is fraught with the possibility that religious beliefs might infuse instruction and never be detected by the impressionable and unlearned adolescent to whom the instruction is directed." *Id.* at 30a-31a. Finally, "the involvement of religious organizations in counseling and education on premarital sex, abstinence, and the preferability of adoption to abortion creates a 'crucial symbolic link' between government and religion when the counseling is funded by the public fisc." *Id.* at 31a. The court reached "the inescapable conclusion . . . that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a.

The court held that the AFLA fosters excessive entanglement due to the sectarian character and purpose of the religious grantees, *id.* at 40a, the "great" potential that AFLA-funded religious organizations would further religion when counseling teenagers, *id.* at 41a, and the fact that ensuring that religion is not promoted "would require extensive and continuous monitoring and direct oversight of every counseling session." *Id.* The court concluded that "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." *Id.* at 42a.[12]

C. FACTS

1. Introduction.

The district court relied on the "undisputed record" which "transform[ed] the inherent conflicts between the AFLA and

12 The court also found that the AFLA is likely to incite political division along religious lines because it addresses issues that are of fundamental importance to religions and about which religions disagree along denominational lines. J.S. App. 43a.

the Constitution into reality." J.S. App. 32a, 38a.[13] The court "carefully and exhaustively" considered "the golconda of documents submitted," *id.* at 7a, which "reveal[ed] the extent to which the AFLA has in fact 'directly and immediately' advanced religion, funded 'pervasively sectarian' institutions, and permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion." *Id.* at 33a.

2. HHS Interpreted The Statute To Require Religious Involvement By All Grantees.

a. Fulfilling The AFLA's Purpose, HHS Injected Religious Bias Into The Grant-Making Process.

In 1982, the first AFLA grant cycle, Marjorie Mecklenburg, the Director of the Office of Adolescent Pregnancy Programs ("OAPP"), selected external field readers to evaluate 405 applications. R. 107, Ex. 7. The director of program development and monitoring for OAPP, Patrick Sheeran, who had extensive experience supervising adolescent grant programs, R. 55, 10-30, testified that he was surprised by the readers who were selected solely by Mecklenburg, both by their lack of

13 The court's reliance on plaintiff's facts was based on the thoroughness of their papers and defendant's admissions:

> [Plaintiffs'] "Statement of Undisputed Material Facts" . . . quoted extensively from the exceptionally large record in this case and cited to the exact place in the record where each quotation could be found. . . . Most of defendant's "disputes" of plaintiffs' facts were unsupported disagreements, complaints that a quote had been taken out of context, or the word "dispute" with a reference to the page in the multi-volume record at which the Court could look up an undescribed disagreement and decide for itself whether the effort was worthwhile. Defendant also "controverts" some of plaintiffs' facts with "declarations to be supplied later." The Court knows of no such later-filed declarations . . . . [S]uch a "response" does not comport with the command of Local Rule 108-h . . . . [The Court] regards as "disputed" all facts pointed to by plaintiff and disputed on the basis of identified evidence in the record that actually makes the point claimed by defendant. As Rule 108-h requires, the Court takes as uncontroverted all other facts pointed to by plaintiffs.

J.S. App. 32a n.14. Of the 1251 facts submitted by the plaintiffs, 1215 or 97.8% of these were uncontroverted. J.A. 619-23.

experience and by the high proportion with religious affiliation (30 or 40 percent).[14] J.A. 98.

The readers' evaluations make clear that they understood that the legislation was intended to *require* religious indoctrination to achieve the legislated goals and to that end requires the involvement of religious organizations.[15] OAPP summaries of the evaluations sent to rejected applicants indicate that the requirement of religious involvement was so central to the Act that the absence of evidence of such involvement was a basis for rejection.[16]

---

14 Intervenor's claim that government officials selected grantees without regard to religious affiliation and ranked them by objective criteria is unsupported. Int. Br. 28. *See infra* pp. 31, 51 & n.107, 52.

15 Readers commented that: "the involvement of religious organizations suggests an understanding of the purpose of the demo. program." R. 155, A., I, 345 (Crow Wing County Board of Health). "I fail to see any involvement of clergy and religious leaders. . . ." R. 111, 333 (Cooperative Education Service Agency). "There is missing a decided pro-life commitment in this proposal . . . . Lacking is the kind of counseling that you get in Catholic Social Service for example." J.A. 509 (Baltimore City). "*A major weakness* in the prevention aspect is no board of community ministerial (psycho-spiritual) value experts are involved as a major hand in values curriculum development or teaching." R. 155, A., I, 342 (emphasis in original) (Department of Health and Human Services, New Orleans). One reader scored an application low because: "No experts on transcendental (the most effective) Judeo-Christian values is represented in the development or teaching of this proposal." A consultant hired by OAPP to evaluate the grant making process asked Ernest Peterson, "What would happen if the ACLU got hold of that comment!" J.A. 511. Comments also included: "The . . . unique aspect of this approach . . . is predicated on the idea that teen pregnancy occurs because teens lack, among other things, spiritual and cultural values . . ." R. 155, A., I, 355 (University of Pittsburgh School of Social Work). Under "Strengths" reviewers wrote: "Involvement of religious/charitable organizations clearly indicated." *Id.* at 329 (Rutgers State University/Regl. Health Programs). "The pastoral training is very, very good involving the religious. . . ." *Id.* at 354 (Kankakeeland Community Action Program).

16 Rejected applicants were told that they had not received funding because: their programs promised "no involvement of religious groups," R. 155, A., 1-A, 505D (Lake Cumberland District Health Department); "[t]here is no evidence that local churches or pastoral help and training will be used," *id.* at 505E (Junior Education of Tomorrow); "[t]here was no discussion of the development of moral or spiritual values as a part of the program," *id.* at 505G (San Diego University Foundation); "[d]escriptions of relationships with community and religious organizations should have been expanded," *id.* at 505K (University of Pittsburgh School of Medicine); "[t]his appears to be the same type of prevention program that has been advocated and practiced by Planned Parenthood for many years. . . . We need . . . those who advocate a more spiritual and moral approach to these teeners," R. 155, A., I, 340 (Arkansas Coordinated Child Effort); "[n]o evidence of use of local family-values experts such as pastors or Christian ed. directors in local churches where teaching could be ongoing," *id.* at 346 (Texas Agricultural Extension Service). *See also* R. 155, A., 1-A, 505B, 505F, 505I, 505J.

b. HHS Funding Decisions Ensured That Religions And Religious Viewpoints Would Be Advanced.

In 1982, out of fifty-nine "care," "prevention" or "combination" grants, nine primary grantees were religiously affiliated organizations, all with Christian theologies. J.A. 683-85, 689, 748-54; R. 155, A., IV, 158, 160.[17] In 1983 all nine were refunded and two religious organizations were added, Families of the Americas Foundation, Inc. ("FAF") and Search Institute. J.A. 748-54; *see also* J.S. App. 34a-36a.[18]

It was clear from the face of the grant proposals that AFLA grants for 1982 and 1983—and 1987[19]—would be used to fund religious organizations, provide religious materials in order to

---

17 Seven were Catholic, one Church of the Latter Day Saints, and one Missouri-Synod Lutheran. J.A. 689.

18 The district court found that "at *least* ten AFLA grantees or subgrantees were themselves 'religious organizations' in the sense that they have explicit corporate ties to a particular religious faith and by-laws or policies that prohibit any deviation from religious doctrine." J.S. App. 34a-35a (emphasis added). Using FAF as an example, the court also stated "[t]he religious character of other AFLA grantees or subgrantees is not as explicit but is nonetheless indisputable." *Id.* at 35a.

19 Because of the five year cap on grant awards, § 300z-4(c)(1), the 1987 grantees are not the same as those subject to discovery in this case. However, information from this record alone reveals the likely religious nature of at least two current grantees. One 1987 grantee, the Archdiocese of Washington, also applied in 1982. A reader's comment at that time was: "The program objectives and benefits are to teach positive sex education along with Christian values of life and family, and to include parents/adults in this catechetical approach. . . ." R. 155, A., I, 320 F.

Materials with explicit religious references from another 1987 grantee, Community of Caring, were included with 1982-1986 grantee Catholic Family Services of Amarillo. *See* R. 155, A., IV, 90-101; *see also* R. 181, Watson Decl. ¶ 22A.

promote religious viewpoints, build AFLA programs on existing religious programs, and provide programs in churches and parochial schools. The district court found that the "programs in operation" did not solve "the First Amendment problems evident from these approved grant applications." J.S. App. at 36a.

i. OAPP Funded Secular Grantees To Use Religious Means To Achieve AFLA Goals.

Secular grantees under the AFLA envisioned their role as helping churches to promote more effectively their religious tenets on sexuality. The grant application for the Southeast Missouri Association of Public Health Administrators, Inc. ("SeMo") states:

> One of the most obvious tools which can be used to change the attitude of young people toward sexual activity . . . is the use of the religious foundation as a support for sexuality education. Most major religions see sexuality as being of God and can therefore . . . help young people to learn about their bodies and the values that relate to sexual functioning in a context that is consistent with the tenants [sic] of their particular faith.

J.A. 562. SeMo was funded to aid churches "in achieving *their* stated goals," R. 155, A., IV, 131-32 (emphasis in original), and to help "families and churches to communicate [their] values more effectively."[20] *Id.* at 134. Further, SeMo felt its "success in delivering sexuality education through fundamentalist churches, if continued, could result in [its] becoming a model program for this type of delivery mechanism." *Id.* at 141.[21]

---

20 In its 1983 continuation application, SeMo predicted a "substantial increase in the level of participation by church and religious organizations . . . primarily from the fundamentalist religions." R. 155 A., IV, 156. From January 1 through September 30, 1983, 43% of the people receiving informational presentations did so through groups with a religious affiliation. *Id.* at 151.

21 SeMo's director sent OAPP a speech about SeMo's work, stating that "the church can do your job better, cheaper and with more continuity. . . . In our program we contact churches through individuals . . . and let them do the selling."

In keeping with the statutory commands, secular grantees used religious institutions as vehicles to promote the AFLA's goals. For example, the Charles Henderson Child Health Center's ("CHCHC") prevention program was based on the view that "there [is] only one mechanism through which the families may become a part of our effort, *that being the church*," J.A. 577 (emphasis in original), and explained that its program would "never contradict [that] which is taught at home or in church, but it should act as a support for these institutions . . . ." R. 155, A., IV, 404. CHCHC used its AFLA funds to promote "Family Week" culminating in "Family Sunday" which encouraged pastors to promote Christian views on the family and "commitment to their moral standards." *Id.* at 403.[22]

Memorial General Hospital Association in West Virginia was funded for a program which included plans to contact religious groups and seek input from the local religious community so as to support the development of teenagers' "own [religious] values." *Id.* at 291. After being funded it reported:

> Our contacts with the local religious community enables us to support our clients in the development of their own values and, if appropriate, to cooperate with these groups or members of the clergy. One YHS [Youth Health Services] staff member has even served as a co-therapist with an area minister. We will continue to involve religiously oriented groups and individuals in our programs at YHS.

Id.[23] A standard workshop session utilized a minister-leader and was designed to answer questions such as: "what are *our*

---

22 OAPP officer Barbara Rosengard was aware that as part of the AFLA programs CHCHC arranged for family day with "sermons in various churches." R. 74, 126.

23 Workshops were conducted in church facilities for both students and "Christian Education Teachers." R. 155, A., IV, 294-98. Another program, the Guidance Center, put on family life education classes in conjunction with religious leaders. Two classes were held in religious schools in the classrooms for the school children. Sessions with ministers were held to encourage their support for and involvement with AFLA programs for their congregations. *Id.* at 413-14.

values as *Christians*," and "what values are presented in the Ten Commandments." *Id.* at 292 (emphasis added). Many other secular grantees promoted religion, aided religious institutions or combined forces with sectarian groups to further sectarian goals.[24]

ii. AFLA Programs With A Distinctly Religious Slant Were Presented To Public School Students.

The School of Public Health of the University of South Carolina, sponsored a public high school play submitted to OAPP in which the script calls for student actors to assert that "*the Church* never has, does not now, and will never approve of abortion." *Id.* at 424, 425, 430 (emphasis added). The peer counselors who wrote the play and the students who saw it were taught that "the Church" is a monolithic structure with one view of abortion.

Search Institute's grant to promote a sex education curriculum in public schools and churches, *id.* at 16, was designed with "an emphasis on family, *church* and community involvement," *id.* at 17, (emphasis added), and was to "*build on* the work Rev. John Forliti of the Search Institute staff has done in developing a value-based sex education model for the Roman Catholic Church[,] [t]itled 'Reverence for Life and Family: A Catechesis in Sexuality.' " J.A. 433; J.A. 115[25] (emphasis added). OAPP staff knew that this program was used by Archdioceses, parishes and Catholic schools and admitted that a class using this manual could discriminate against Jews. J.A. 115-16; R. 125, 54, 122-25.[26]

24 The Maternal and Child Health Program in Hawaii was funded to provide "church and counseling based efforts at reaching families," plan "seminars for professional church staff and church volunteers" and encourage churches "to offer their unique lesson materials on teen sexuality and family involvement." J.A. 579 (emphasis added). Lyon County Health Department's grant proposal noted that "[s]uch sensitive and intimate [sex education] material *cannot* be presented without touching on . . . religious beliefs." R. 155, A., IV, 221. Lyon County held classes at several churches and parochial schools. *Id.* at 230, 238. Tucson Unified School District No. 1 described how subcontractee St. Elizabeth's would distribute a film to "help[ ] boys and girls understand their roles and live their lives as Christians." *Id.* at 289. Community Health Clinics in Nampa, Idaho applied for a grant to expand an existing program which one minister's support letter noted would "help motivate and facilitate [the churches] in doing what we need to be doing." *Id.* at 329. Hill Health Corporation organized a network including two churches and a Catholic social services agency to provide a "homeostatic balance by which parents and their children grow and interact, learning from each other, in a manner that is culturally and socially acceptable to the community, i.e., *the church*, the schools and other institutions the family comes in contact with." *Id.* at 392-94 (emphasis added). Hill Health makes religious practices one of the measures of family togetherness: "poor family togetherness" is indicated where "religious practices are absent." *Id.* at 397.

iii. OAPP Funded Grantees To Build Upon Existing Religious Programs.

Some grantees had pre-existing religious programs. St. Ann's, a home for unmarried pregnant teenagers, operated by the Order of the Daughters of Charity and owned by the Archdiocese of Washington, R. 155, A., III-A, 512, subcontracted with the "Center For Life" at Providence Hospital. The Center was chosen to provide the mandatory educational component because it would do so in accordance with the teachings of the Catholic Church. J.A. 286-87; R. 155, A., III-A, 512, 516. The Center's AFLA program, "Pathways," consists of classes for pregnant teens in fertility awareness,

25 The brochure for the book explains that it has as its goal " 'training in chastity in accord with the teaching of Christ and the Church.' " R. 155, A., IV, 31. Rev. Forliti, who applied as the proposed AFLA project director, *id.* at 14, 23, wrote the program as part of his responsibilities as Director of Religious Education for the Archdiocese of St. Paul. R. 125, 53.

26 Brigham Young University ("BYU") was funded for development of a public school sex education curriculum which had as the project director a former Bishop of the Mormon Church and a current faculty member in the family life department at BYU. Religion courses are required at BYU, faculty members are required to adhere to the principles of the Mormon Church, and the expressed philosophy about education is one that combines secular and religious teachings: "It has always been the view of The Church of Jesus Christ of Latter-Day Saints that education is not complete without proper integration of secular and religious knowledge and values. Understanding and skill are important attainments in life and will better serve the individual when accompanied by religious convictions, attitudes and standards of behavior." R. 155, A., VI, 202-03; *see also* J.A. 616-17.

contraception,[27] intimacy[28] and natural family planning. Pathways was taught by the same employees, using the same religious materials,[29] as the pre-existing and still continuing "Rainbow" program developed by the Center for Catholic schools.[30] Girls at grantee St. Ann's are instructed on the "Christian tradition" of marriage. J.A. 344. That St. Ann's provides religious instruction is not surprising because it "functions according to Christian principles as taught by the Catholic Church." R. 93, Ex. 2; *see also* J.A. 314-15.[31]

---

27 The original grant application stated that the family life component would "present information both on the advantages and the medical hazards of common contraceptive methods." However, St. Ann's submitted a revised version to HHS stating it would only "present information on the medical hazards of common contraception methods," J.A. 294-96, because the assistant administrator of St. Ann's wanted the grant proposal to reflect more "accurately" the thrust of the classes. J.A. 316-17; *see also* J.A. 288-91. Biased information on contraception consistent with the church's teachings was in fact presented. J.A. 299-300, 337, 350-53, 360-61, 363-64.

28 The "spiritual" facets of intimacy include "meaning of life for both partners, relationship to universe and God." R. 59, Ex. 4, at 5.

29 At St. Ann's, books that contain Catholic doctrine on chastity, masturbation, homosexuality and abortion, bought and paid for by the AFLA, were distributed to participants. *See* J.A. 336, 354-59, 362. After discovery in the lawsuit, HHS wrote St. Ann's and asked that two religious books, McGoey, *Sex, Love and the Believing Girl* and Knight, *The Good News About Sex*, not be used. J.A. 674. HHS, however, made no effort to prevent St. Ann's from distributing the other religious books that were used in the program, including McGoey, *Sex, Love, and the Believing Boy*, R. 59, Ex. 20, and Espinosa, *Birth Control, Why Are They Lying to Women?*, which states, for example: "The gentleness with which we should approach human life has transcendental roots: 'To me you shall be sacred; for I the Lord am sacred.' (Lev. 20:26). To work in the pro-life movement you should, in a way, 'Take off your shoes, because the ground on which you are walking is holy.' (Ex. 3:5)" J.A. 365.

30 The Rainbow brochure states it "provides . . . a more Christian, pro-life education in sexuality than that available in the public sector." J.A. 370.

31 St. Ann's progress report stated: "Our philosophical orientation is that sexuality [i]s a God-given gift to be used with reverence. . . ." J.A. 376. It mentions God two additional times and ends by asking: "How is the work we are doing in this project different because we believe in Jesus Christ?" J.A. 377.

Families of the Americas Foundation ("FAF"), formerly World Organization Ovulation Method-Billings ("WOOMB"), U.S.A. is a Catholic organization whose "broad purpose" is to "disseminat[e] accurate information about the Billings Ovulation Method," ("BOM") a method of natural family planning.[32] FAF viewed the AFLA as an opportunity to expand its existing Christian sexuality program "based on the teachings of the Catholic Church;" its application proposes goals identical to that of the existing program. J.A. 379-80, 387, 390. The application makes clear that BOM "[i]s not only a method of birth regulation but also a philosophy of pro-creation . . . ," and OAPP staff members were aware that this meant teaching a religious philosophy. J.A. 141-43. One of the funded grant activities entailed "providing continuous communication on all of our national and international activities with the newly founded 'Pontifical Council for the Family' at the Vatican." J.A. 168.

Catholic Charities of the Diocese of Arlington ("CCDA") was funded to provide an educational program solely for Catholic schools or religious classes in Catholic parishes. J.A. 211-12.[33] Recruitment was done through pastors or directors of religious education, R. 80, 82-84; R. 75, 53-55, 85-86,[34] and the

---

32 The district court found:

> Family of the Americas Foundation ("FAF"), for instance, is an affiliate of "WOOMB-International," an organization without discernable [sic] religious ties. But WOOMB's "Aims and Objectives" states that the organization was "inspired by the Encyclical *Humane Vitae*," the papel [sic] encyclical setting forth Catholic dogma on birth control and abortion.

J.S. App. 35a; *see also* R. 155, A., V, 41. In a letter to the President of the Pontifical Council for the Family, Mercedes Wilson described her organization as "a lay organization, strongly committed to the implementation of the teachings of the *Humanae Vitae* and *Familiaris Consortio*." J.A. 627. One FAF brochure states that the BOM is the "Christian Alternative," R. 230, Ex. 1, and FAF's letterhead states: FAF, Inc., WOOMB, USA, "*The Christian Alternative.*" J.A. 629 (emphasis added).

33 *See also* R. 80, 23-25; J.A. 222-23.

34 Similarly, the grant application of Catholic Social Services of Wayne County (CSS) indicated that recruitment for its prevention program was to be centered on churches, the Catholic Youth Organization, parochial schools and public schools. R. 155, A., IV, 364.

only "manuals" listed as reference sources for the program were explicitly religious. R. 155, A., III, 46. Every AFLA presentation of the CCDA included a lecture on the church's teachings by a priest. R. 75, 75-76; R. 79, 17, 20-22; R. 80, 67-68, 91-92, 223. In some instances attempts were made to give the appearance that the religious lecture was separate but as the district court found:

> [S]ome grantees . . . establish[ed] programs in which an AFLA-funded staffer's presentations would be immediately followed, in the same room and in the staffer's presence, by a program presented by a member of a religious order and dedicated to presentation of religious views on the subject covered by the AFLA staffer. This transparent attempt to isolate the sectarian from the secular is unconvincing . . . .

J.S. App. 37a (citations omitted).[35]

Catholic Family Services of Amarillo, Texas ("CFS"), like CCDA, identified itself as part of the Catholic Church with the "Bishop retain[ing] authority" over CFS "where basic doctrine is at issue." R. 181, Watson Decl. ¶ 2. Like CCDA, CFS proposed to use AFLA funds to expand sex education programs "through the parish social ministry." R. 155, A., IV, 83.[36] From the beginning of funding in May 1984, CFS held twenty-one prevention programs in churches, parochial schools and Catholic family services; only three programs were held in non-sectarian settings. R. 181, Watson Decl. ¶ 11. Its continuation application explained: "What has seemed most feasible has been to contact church groups and have them *sponsor* such sessions *for* church members with an invitation to the general public." *Id.* at 86 (emphasis added). CFS used a curriculum outline guide for the AFLA parent workshops with explicit theological references, *see id.* at 101B; R. 181, Watson Decl.

35 A secular grantee, Northwest Louisiana Health Department, also sponsored AFLA workshops at churches which were accompanied by religious presentations about sex. J.A. 568, R. 155, A., IV, 197-204.

36 The care component proposed pregnancy counseling where caseworkers would discuss "the detrimental effects" of abortions, as well as "the destruction occurring to an unborn infant," although an effort would be made not to put "heavy" guilt feelings on the teenager. J.A. 513.

¶ 22D, as well as religious materials as "reference" materials, *see* R. 155, A., IV, 90-101, 103-106.[37]

The district court found that St. Margaret's Hospital is "a self-described 'Christian institution' committed to acting 'in harmony with the teaching of the Catholic Church.' " J.S. App. 33a.[38] Out of the one hundred institutions named in St. Margaret's grant application to receive AFLA education courses, ninety-six were Catholic schools, churches or parish religious educational programs. R. 155, A., II, 38-42. *See also* J.A. 554; R. 229, Ex. 3. The grant expanded St. Margaret's program, which is based on the premise that family breakdown is due to "secularism," and "widespread ignorance" "of the ideal of holiness inherent in the basic tenents [sic] of Judeo-Christian beliefs." J.A. 515. Its stated objective was to emphasize the "pastoral intervention of the church," because "[s]piritual guidance is essential to maintain spiritual purity." *Id.*

37 Materials with "strong religious emphasis" were given to some participants although the explicit references to scripture and other theological orientation were deleted. R. 181, Watson Decl. ¶ 22. CFS admitted using the film "Everyday Miracle," which they describe as "depicting the miracle of the process of human reproduction as a gift from God." R. 155, A., IV, 119; R. 181, Watson Decl. ¶ 22E. The study guide for another film, attached to their continuation application, included "suggested Scripture readings" and a section called "Theological Orientation." J.A. 559.

38 Grantee Good Samaritan Hospital, also a "Catholic sponsored health care facility," R. 155, A., IV, 158, was funded, as the district court found, to provide "spiritual counseling." J.S. App. 36a; R. 155, A., IV, 181. Intervenor criticizes this court's finding stating: "[w]hat the court did not point out is that the proposal for spiritual counseling was *rejected* by the secretary as '*not legally permissible*.' " Int. Br. 42. This statement, like others characterizing the facts, distorts the record. Over a year-and-a-half after SUMA was *funded*, an OAPP staff member wrote a letter stating:

> In one of the documents you provided us, there was a reference to spiritual counseling services provided by the Inter-Parish Ministry. If this is part of your project, it is *not legally permissible* in a federally funded project and you should revise the project accordingly.

J.A. 676 (emphasis in original). Obviously HHS did not even know what its grantee was doing, gave no specific guidelines for revising the program, and offered no evidence that any steps were ever taken beyond this letter to ensure that the religious aspects of the program—only one of many—were discontinued. *See* R. 155, A., IV, 159, 169.

c. OAPP Condoned The Promotion Of Religious Doctrine.

For a year-and-a-half, St. Margaret's AFLA program used AFLA funds to teach an explicitly Catholic curriculum with references to God, Christ and Christian tenets in over ninety parochial schools in Boston. J.S. App. 36a, 37a; J.A. 417-26; R. 231, 95-104.[39] After this obvious constitutional violation could no longer be ignored, HHS nevertheless allowed the same teachers to use the "same" curriculum tailored to Catholic theology in the public schools with only the explicit references to "God" or religion removed, J.A. 404, 410, 413, 416; R. 231, 157,[40] and re-funded St. Margaret's for three more years, J.A. 754.

Despite the references in many grant applications to religion, presentations in churches and involvement of clergy, no meaningful investigation was undertaken by HHS before awarding the grants. J.A. 158-59. One grantee, CCDA, was even viewed by Sheeran and an HHS attorney-consultant as nothing more than a "glorified Confraternity of Christian Doctrine program." J.A. 109-11. The only HHS response was to order Sheeran to call only the Catholic grantees which had already been selected for funding but before the official award. J.A.

39 The St. Margaret's tenth-twelfth grade curriculum instructs that: "The Church condemns . . . contraception . . . [b]ecause it deliberately frustrates the natural power of conjugal acts to generate life, is a grave sin and is intrinsically evil. (Pius XI—Casti Connubii)." J.A. 423.

40 On April 16, 1984 Mecklenburg wrote Sister Natwin at St. Margaret's Hospital that due to this lawsuit the religious curriculum could not be used with AFLA monies because to do so makes "Federal funds . . . *susceptible* to being used to advance particular teachings of the Catholic Church." J.A. 518 (emphasis added). Four months later St. Margaret's responded by stating that it was "*currently* able to provide expanded program services in public school settings such that the federal funds will be utilized solely in the public school settings." J.A. 520 (emphasis added). The public school and private school curriculums were seen by the education director as the "same curriculums." J.A. 411; *see also* J.A. 401, 402. Health educators who teach in the AFLA program were trained with both curriculums simultaneously. J.A. 411. Although the public school curriculum does not contain the sections *entitled* "The Church's teachings," the curriculums were otherwise identical including stressing the preferability of "natural" contraception, the immorality of abortion, and the abortifacient qualities of the IUD. R. 155, A., II, 477-92.

106-107, 160-61. The officer obtained assurances that they would not use AFLA money for "teaching religious classes." J.A. 107. No specific inquiry was made about the use of church and parochial school facilities, reliance on religious literature, or the effect on the programs of the grantees' religious missions. The calls lasted two or three minutes. J.A. 112-13.

Director Mecklenburg viewed the "involvement of churches" as consistent with the "intent" of the programs called for under the AFLA. J.A. 71-72.

d. Grantees' Activities Were Governed By Religious Requirements.

Because some grantees are governed by religious dictates, the services and information teenagers receive are far more restrictive than required by the statute.[41] And, whether abiding by these statutory restrictions or going beyond them, grantees viewed their reasons for promoting abstinence[42] and adoption over abortion as religious and not statutory or secular.

AFLA grantees *may* provide *referral* for abortion counseling to a pregnant adolescent upon the parent's request. § 300z-10(a) (emphasis added). Nevertheless, solely because of religious dictates many AFLA grantees will not refer teenagers for abortion even if requested to do so by the adolescent and her parents. St. Ann's refusal to provide abortion counseling even if requested was inconsistent with the AFLA and, as found by the district court, was intended instead to conform to the

41 Their religious missions do not merely "coincide[ ] with the purposes of the governmental program," Int. Br. 7, they far exceed them.

42 For example, at St. Ann's "premarital abstinence" was not taught as a secular value but rather as a religious one. St. Ann's course outline refers to II Samuel 13 of the Old Testament in substantiation of the principle that sex outside of marriage may involve the "danger of egotistic reasons" for intercourse. J.A. 347. Another AFLA purpose is to prevent *adolescent* sexuality and adolescent pregnancy. § 300z(a)(10)(A). Nevertheless, grantees for religious reasons teach that premarital sexuality at any age is wrong. *See* R. 155, A., III-A, 492-93, 517.

religious philosophy of the Catholic Church that abortion is a sin.[43] J.S. App. 34a; R. 155, A., III-A, 475-76.[44]

Although projects may not provide family planning services "unless appropriate family planning services are not otherwise available in the community," § 300z-3(b)(1), there are no statutory restrictions on counseling and referral services and no limits on the kinds of family planning that can be discussed. Nevertheless, solely because of religious dictates, some AFLA grantees only teach and refer for natural family planning ("NPP") which "has never been used successfully with teenagers," J.A. 535. For religious reasons, St. Ann's, J.S. App. 33a-35a, St. Margaret's and FAF[45] will not refer program participants for contraceptives and because CFS "is Catholic, no contraceptive devices or birth control pills will be offered." R. 155, A., IV, 126.

All Catholic hospitals and health facilities are required to follow the *Ethical and Religious Directives for Catholic Health Facilities* ("*Religious Directives*") which govern the delivery of medical care, largely in the area of reproductive health. J.A. 526, 540-44.[46] Thus, although Catholic hospitals do not generally practice medicine in a sectarian way, their obstetrical and

43 St. Ann's Employee Handbook requires the hospital to function "according to Christian principles as taught by the Catholic Church." R. 155, A., III-A, 475.

44 Similarly, employees of Catholic Charities of Arlington were prohibited from taking any "action inconsistent with Catholic doctrine, such as recommend[ing] abortions for clients." R. 181, West Decl. ¶ 4. And employees at St. Margaret's may not make referrals for abortion because it would not be "in accordance with teachings of the Catholic Church." J.A. 408.

45 Offering methods of contraception other than NFP is not allowed at St. Margaret's "[b]ecause it is in conflict with the teachings of the Catholic Church." J.A. 407. The director of FAF has stated: "Because of our religious beliefs, we cannot provide nor refer couples to programs that offer artificial methods of birth control, sterilization and abortion." J.A. 628.

46 The *Directives* state: "*Any* facility identified as Catholic assumes with this identification the responsibility to reflect in its policies and practices the moral teachings of the Church, under the guidance of the local bishop. . . . The Catholic-sponsored health facility . . . further, carr[ies] an overriding responsibility in conscience to prohibit those procedures which are morally and spiritually harmful." J.A. 541 (emphasis added).

gynecological units do.[47] Religiously imposed restrictions on abortion and sterilization interfere with the secular practice of medicine, which results in harm to the patients. J.A. 543-44, 546.

All medical personnel are required to comply with the *Religious Directives* regardless of their own personal and professional opinions. J.A. 526; J.S. App. 33a-34a. Both a physician and a nurse who worked at St. Margaret's believe that the obstetrical and gynecological care given at the hospital "is dictated by Catholic religious directives which are often counter to the patients' best medical interests, the current standard of medical care as practiced in secular institutions, and medical ethics." J.A. 525, 549-50.[48] Because of these requirements, physicians are unable to give their patients full informed consent and are prohibited "from performing, prescribing, recommending or even referring for sterilization, abortion or contraception." J.A. 527, 550. Medical personnel are "required to treat the embryo as a person from the moment of conception regardless of whether this belief is shared by the woman." J.A. 527 (citation omitted).[49] Consequently, women are forced to endure greater risks to their health, not as a result

47 Under the AFLA even secular grantees involved religion in their care services. For example, Lyon County Health Department stated that under its "care" component, "[s]piritual counseling will be promoted" and "[e]ach pregnant adolescent and her family will be urged to make one formal contact with a church minister." R. 155, A., IV, 226.

48 Dr. Louis Laz and Nurse Kim Maisenbacher each submitted affidavits. The Duncan Affidavit submitted by HHS, J.A. 677-80, does not refute these affidavits. While Dr. Duncan, Medical Director at St. Margaret's, disputes how harmful the effect of the religious guidelines are, he admits that the care given is "within the guidance of the religious directives." J.A. 678.

49 Dr. Laz explained,

> Patients are never told prior to accepting care at St. Margaret's that regardless of their personal choice or health needs, they will never receive these procedures, or referrals, or be counseled in all available medical options. St. Margaret's has Haitian, Southeast Asian, Hispanic, and other non-English speaking patients who do not even know that abortion or sterilization are legal options. And, no matter what strain on their health and life their pregnancy might present, they will not find out about these options.

J.A. 527.

of their beliefs, but because of the federally funded religious practices of the grantees. *See* J.A. 529-30.

e. HHS And AFLA-Funded Programs Convey To The Public That The Government Supports Religion.

AFLA's endorsement of religion is evidenced by letters telling applicants that they were rejected because, for example, "there is no evidence that local churches or pastoral help and training will be used." R. 155, A., I-A, 505E.

As the district court found, "the fact that AFLA programs were held in rooms full of religious symbols" and that there was "joint presence of denominational personnel and federally funded employees" created the "symbolic tie, if not actual tie, between government and religion." J.S. App. 37a & n.17. In addition, in many instances the publicity for AFLA programs linked the receipt of federal funds to specific religious tenets of particular religions. This created the public impression that the federal government approved and sponsored the doctrines of certain religions.[50]

Catholic Social Services of Wayne County advertised its program with a flyer announcing:

> A parish resource . . . Catholic Social Services of Wayne County presents: CASI* COMMUNICATION AROUND SEXUAL ISSUES . . . In keeping with the Pope's strong guideline, Catholic Social Services of Wayne County developed and received funding for a special program . . . .

The asterisk refers the reader to the bottom of the flyer which states "*C.A.S.I. is a Federally funded Adolescent Family Life Demonstration Project." J.A. 576. CSS's publicity efforts were designed to reach a primarily Catholic audience. R. 155, A., IV, 358-59; J.A. 576.

---

50 The religious nature of sexuality education was so interwoven with the "secular" for Catholic Charities of Arlington that the Bishop's announcement about the program explained that while federal money could not be used to "teach" religion, "Charities staff" would be "coordinating efforts with pastors, directors of religious education and other Diocesan offices as appropriate to provide the *religious dimension*." J.A. 213 (emphasis added).

Catholic Family Services of Amarillo, Texas, announced in a press release that was attached to their AFLA progress report that "the Adolescent Pregnancy Care and Prevention Program is a welcome addition and will provide new opportunities to carry out the mission of Catholic Family Services." J.A. 155. That mission as stated on page one of its grant application includes "emphasiz[ing] the truth of Christ through which a loving God makes Himself available to all persons." *Id.*; R. 155, A., IV, 72. News articles announcing the Catholic Family Services grant linked the Federal money with Catholic beliefs.[51]

The University of South Carolina sent letters to ministers who failed to attend a Minister's Action Coalition meeting set up under the AFLA program. The letter stated in part:

> It really is up to the churches of our community to define what behavior is morally acceptable and advisable. The churches have traditionally set the moral standards for the community.

R. 155, A., IV, 422-23. This sent a message of government endorsement of religious groups defining what sexual behavior and life decisions are morally acceptable. Similarly, Lutheran Family Service sent out "Dear Pastor" letters announcing the grant, asking them to "share a message from Lutheran Family Service at one of your next circuit meetings," and informing them that among others they would be seeking ideas from the "church community" "as to the most appropriate scenarios" for their adoption advertisements. *Id.* at 245.

In addition, as the court found, "the overwhelming number of comments shows that program participants[52] believed that

---

51 An article appearing in the *Amarillo Globe Times* (Nov. 24, 1982), announced that CFS of Amarillo had received a $250,000 grant from the federal government for the development of education and counseling services for adolescents. The article goes on to note that "The agency, due to *religious doctrine*, recommends adoption for children born to young *unwed* mothers." J.A. 561 (emphasis added). Another article about the government grant stated: "Since the agency [CFS] is Catholic, no contraceptive devices or birth control pills will be offered." R. 155, A., IV, 126.

52 Likewise, secular grantee Northwest Louisiana Adolescent Family Life Project aimed its programs at a narrow audience belonging to "churches, church facilities, parochial schools and other religious institutions." R. 155, A., IV, 197-209.

these federally funded programs were also sponsored by the religious denomination." J.S. App. 37a.

f. The Values Promoted By The AFLA Are Of Core Theological Concern To Some Religions.

The values promoted by the AFLA, including the encouragement of premarital chastity and adoption and the discouragement of abortion, may very well be secular values under some circumstances. Nonetheless, they lose their secular nature when promoted in theological terms or taught by religious figures or institutions.

As the district court found, "the harm of premarital sexual relations and the factors supporting a choice of adoption rather than abortion . . . are fundamental elements of religious doctrine." J.S. App. 28a. Thus, by providing aid to religious organizations for the purpose of teaching these values, "the AFLA contemplates subsidizing a fundamental religious mission of those organizations." J.S. App. 30a.

Plaintiffs submitted unrebutted evidence establishing that, for religious groups, abortion and other issues relating to sexuality are religious issues.[53]

Plaintiffs also established that the issue of abortion is deeply divisive among religious denominations. The position a particular religious group takes on abortion depends on that group's theological beliefs concerning, for example, the value of the fetus, the value of the woman's life and well-being, the importance of individual decisionmaking, and the role of sexuality. J.A. 595, 599, 601-05.

---

53 Dr. Paul Simmons, a Baptist Minister and professor of Christian Ethics, stated:

> The very purpose of religion is to transmit certain values, and those values associated with sex, marriage, chastity and abortion involve religious values and theological or doctrinal issues. In encouraging premarital chastity, it would be extremely difficult for a religiously affiliated group not to impart its own religious values and doctrinal perspectives when teaching a subject that has always been central to its religious teachings.

J.A. 597; *see also* J.A. 607.

While some religious groups have tenets that make abortion a sin, others deem abortion to be a religious choice to be made by the individual, and still others believe abortion to be religiously required in some circumstances.[54]

The related issues of premarital sexual intercourse and birth control are also religious matters of central importance to religions and about which religions disagree. By requiring religious organizations to be involved in a prog m designed to stress sexual chastity prior to marriage, rather than abstinence or the use of birth control during adolescence, the AFLA inevitably furthers the theological beliefs of certain religions over others.

The teachings of the Roman Catholic Church emphasize the sacred nature of the marital relationship and condemn not only abortion, but all "artificial" means of contraception. Pope Paul VI, encyc. letter *Humanae Vitae: Acts Apostolicae Sedis* 60 (1968), *reprinted in The Papal Encyclicals, 1958-1981*, 223, 226-27 (C. Ihm, ed. 1981). Natural family planning is the only form of birth control acceptable to the Catholic Church. *Id.* at 227.[55] Many conservative Protestant sects have similar views. *See* R. 155, A., I, 80-81, 84; R. 155, A., VI, 136, 152.

By contrast, the Jewish faith does not condemn the use of contraceptives. *See* R. 120, 18-19. The view of the religious plaintiffs is that decisionmaking is the responsibility of the individual and the role of the church is to provide information

---

54 In fact, under Jewish law, where pregnancy threatens the life or health of a pregnant woman, it is her religious duty to have an abortion. J.A. 600. Methodist teachings hold not only that a pregnant woman should be permitted to make her own decisions regarding pregnancy but also that she should be counseled on all available options, including abortion. J.A. 606.

55 The government agreed with the following characterization by the plaintiffs of the Catholic Church's position on these issues:

> Another religious tenet of the Roman Catholic Church holds that "Sexual intercourse divorced from the context of procreation loses its significance, exposes the selfishness of the individual, and is a moral disorder." Vatican Congregation for Catholic Education entitled "Educational Guidance in Human Love," Nov. 1, 1983.

J.A. 684. *Compare* R. 120, 53-54 ("chastity as an absolute which would lead to celibacy is not condoned at all in the Jewish community").

and guidance to help the individual exercise his or her own moral judgment. *See* R. 121, 20, 22-23, 28, 46-47; R. 118, 19, 49, 59; R. 119, 15, 26, 29, 38-39, 40-41; R. 122, 38, 58, 62-63.[56]

g. The AFLA Promotes Certain Religious Denominations While Denigrating Others.

The AFLA anti-abortion restrictions have limited religious grantees to those with theological dictates opposed to abortion. Religions that view the decision whether to have an abortion as a matter of individual conscience or as sometimes religiously mandated cannot, consistent with their religious views, teach an AFLA sex education course or implement an AFLA case project which forbids the mention of abortion in pregnancy counseling.

The Act's discrimination among religions is revealed by the self-selecting application process. Of the fifty AFLA grant applicants in 1982 that are immediately identifiable as religiously affiliated organizations, all but one share the Act's anti-abortion bias. R. 107, Ex. 7.[57] Of the identifiable religiously affiliated grantees receiving funds under the AFLA, *all* have been conservative *Christian* groups.

Religions are disadvantaged by the government's endorsement of only those religions whose doctrines coincide with the values to be promoted by AFLA. Plaintiff ministers all testified that their work has been made more difficult by the

---

56 The reason intervenor defends the AFLA is because it furthers particular religious beliefs. In the district court, intervenors argued that enjoining the AFLA would interfere with the free exercise of religion "of parents, including defendant-intervenors, whose religious faiths forbid abortion and premarital sex and require them to raise their children according to these tenets." R. 147.

57 In addition to submitting affidavits and other unrebutted evidence of the applicants' positions on abortion, *see* R. 155, Statement, I, ¶ 24, plaintiffs asked the court below to take judicial notice of the applicants' religious beliefs on abortion, pursuant to Fed. R. Evid. 201. *See United States v. Kahane*, 396 F. Supp. 687, 692 (S.D.N.Y.), *modified on other grounds*, 527 F.2d 492 (2d Cir. 1975). Thirty-eight of the identifiably religious applicants were affiliated with the Roman Catholic Church, ten were Protestant groups that adhered to tenets opposing abortion, and one was a Mormon group that also opposed abortion. The one remaining organization was affiliated with the Methodist Church and was not funded. R. 107, Ex. 7.

AFLA's sponsorship of religious beliefs antithetical to their own. For example, Reverend Vaughn, who teaches a sex education course for teenagers near the AFLA funded course taught by Catholic Charities, testified that because the AFLA put the "whole weight of Government . . . behind a particular view of sexuality," he had to put more time and effort into articulating how Methodist beliefs on sexuality differ from those of other faiths. R. 122, 25-27, 38-40. He described counseling an adolescent who had attended a sex education program taught by him as well as an AFLA-funded sex education program sponsored by Catholic Charities of Arlington. *Id.* at 19-21.

The AFLA also interferes with the religious beliefs of many of the adolescents who participate in the funded programs. The government claims that the religiously affiliated grantees, like other grantees, provide funded services without regard to the recipients' religious affiliation. *See, e.g.*, J.A. 438, 442, 451, 460, 494. But this simply means that all adolescent participants, including adolescents whose religious beliefs differ from those promoted by the AFLA as well as those with no religious beliefs at all, are exposed to the same government-sponsored, religious values and tailored information. All "*patients*" as well as employees of Catholic health facilities must "respect and agree to abide by" the Ethical and Religious Directives of Catholic Facilities which require adherence to Catholic doctrine on reproductive health. J.A. 541. The student comments that are available from the St. Margaret's and St. Ann's programs indicate that they recognized the religious content of the federally funded programs:

> I don't think they should try to discourage kids from using birth control because the Church says not to. Some kids have made mature decisions and dwelling on what the Church says may give them a guilt trip.
>
> . . . .

J.A. 522.

> Even though this is a Catholic school, I feel the actual facts are more important than moral issues and how the church feels.

R. 155, A., II, 495.[58] Unsolicited comments from a participant in St. Ann's program about a lecture on "intimacy" complained that many of the girls felt that the lecture was "a preached sermon" and that they didn't like "being preached at." J.A. 373.

As plaintiffs have thoroughly documented, the religiously affiliated grantees did, in fact, use AFLA funds to teach and provide care in accordance with their own religious dictates. *See supra* pp. 9-22. One book used for at least a year and a half in the St. Ann's program denigrated both Judaism and Eastern religions.[59] Furthermore, both secular and sectarian organizations funded under the AFLA discriminated among religious denominations in involving religious and community organizations pursuant to the AFLA.[60]

---

58 Other students wrote:

> More information on birth control, but not how the church feels.
>
> . . . .
>
> The most effective birth control other than what the Church approves of. She spent so much time on the natural family planning (rythm [sic] method) as a good thing because the Church approves it but she failed to mention that it is not good for teenagers to use this method—it's not really safe.

J.A. 522.

59 R. 106, Ex. 15, 41-42, 167-68. This was one of the two books HHS eventually asked St. Ann's to discontinue using. *See supra* p. 14 n.29.

60 SEMO reported that they "avoid ministerial alliances and other ecumenical groups" because "anything the ministerial alliance is for, the more fundamentalist churches are likely to be against." J.A. 566. A state grantee, the Woman's Advocacy Bureau of the Louisiana Department of Health and Human Resources, stated that it would involve "the *major* religious denominations in the Baton Rouge area, including Catholic, Baptist, and Methodist." R. 88, Vol. 4, Grant 102, Response #3 (emphasis added). Grantee Family Service Agency of San Francisco notified HHS that it would include only "San Francisco Council of Churches, [and] Catholic and Jewish Religious Representation." *Id.*, Grant 101, Response #3. The Director of the AFLA program of Catholic Social Services of Wayne County stated that invitations for membership on the AFLA advisory committee ("open to all who chose to participate") were sent to "clergy from *both Protestant* and *Catholic* churches" and reported that "clergy (Catholic and Protestant)" were represented over time on the committee. R. 181, Zettle Aff. ¶ 112.

SUMMARY OF THE ARGUMENT

No prior case before this Court has ever documented so thoroughly a statute's actual advancement of religious belief and the spiritual and physical harm resulting from that advancement.

This Court has recently stated that the Establishment Clause "*primarily* proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 381 (1985) (emphasis in original) (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973)). Plaintiffs' uncontroverted facts establish, and the district court held, that the AFLA flouts all three of these proscriptions. Under *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971),[61] this Court must declare the AFLA unconstitutional.

The AFLA endorses religion by requiring all programs funded under the Act to involve religious organizations; by failing to provide statutory assurances that public money will be used only in secular ways; and by selectively funding only those religious groups that hold specific theological views on sexuality and reproduction.

Pursuant to the Act, the government has funded both secular and sectarian grantees to teach religion in public and parochial schools. The government has funded grantees to teach Catholic doctrine on chastity, masturbation, homosexu-

---

61 This Court has used the *Lemon* test in cases ranging from giving direct aid to parochial schools, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to giving churches political power, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), to erecting religious symbols in public settings, *Stone v. Graham*, 449 U.S. 39 (1980); *Lynch v. Donnelly*, 465 U.S. 668 (1984), to imposing regulations that entangle church and state, *Aguilar v. Felton*, 473 U.S. 402 (1985). Properly applied, the *Lemon* test invalidates the AFLA even more clearly than in these prior cases.

ality, birth control and abortion, and to provide programs that included the "Biblical and theological views regarding sex." J.A. 568. The government has funded health care programs that are restricted by religious dictates which may conflict with adolescents' health needs. This government funding has the effect of enhancing the stature and political influence of some religious groups and of sending an unmistakable message of government endorsement of particular religious views.

The district court found it "impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a. This holding is amply supported by the religious character and purpose of the institutions, the nature of the aid, which is highly susceptible to the infusion of religious beliefs, and the extensive and continual monitoring by the government of religious activity that would be necessary to ensure secular use of AFLA funds.

The far-reaching theories put forth by the government and intervenor cannot obscure the simple fact that Congress has promoted and continues to promote religion through the AFLA. This case is *not* about the constitutionality of religious organizations' participation in programs established under properly constructed statutes respectful of the establishment clause's limiting principles. The issue in this case is whether we will continue to operate within a system of government that is separate from religion, and which does not "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1 (1947). If the government may fund, as it does under the AFLA, both religious institutions and secular institutions to promote religious beliefs, then the protection offered by the religion clauses will be nothing more than a paper promise.

I. THE AFLA VIOLATES THE *LEMON* "EFFECTS" TEST BECAUSE IT IMPERMISSIBLY ADVANCES RELIGION.

There can be no question that the AFLA not only risks the advancement of religion but that it actually does advance

religion. The AFLA's mandates on religious involvement give religion a preference over nonreligion. HHS funding decisions carry out the legislative intent to promote religion.

For example, the only 1982 program that was not re-funded—not because it was too religious, but because it was not religious enough—was the University of Arkansas. Sheeran testified that despite receiving the Arkansas Medal of Excellence, a positive review from OAPP staff and high scores on an objective scale,[62] the University of Arkansas program was not re-funded because Mecklenburg "caved in" to pressure from people who felt the materials used by the university were "Godless" and violated their religious beliefs. J.A. 132-34. Instead, the grant went to FAF, an indisputably religious organization, which received a grant seven times as large. J.A. 751-52. Mecklenburg testified that FAF's program, which promoted a religious philosophy, J.A. 143, was "more complementary and provided a different perspective" than that of the University of Arkansas. J.A. 83.[63]

The government goes badly astray when it implies that as long as the benefited institutions are not "pervasively sectarian," sectarian activities may be subsidized. Gov. Br. 27. The "pervasively sectarian" inquiry is useful only because it identifies institutions for whom no degree of legislative care in the disbursement of aid will suffice to ensure that funds are used solely for secular ends. But where cash grants have not been restricted to secular purposes by statute, or worse, where they have been designated for sectarian purposes, ruminations

---

62 Although the University of Arkansas was told by OAPP that the reason they were not re-funded in 1983 was that they "did not score . . . high enough," OAPP officials admitted in depositions that they lied. J.A. 135; R. 107, 128.

63 FAF's identical 1982 application scored so low it was not even considered for funding. Two government agencies would not approve or recommend FAF for funding and the grants manager for HHS Region VII noted that FAF proposed to "promote its values at public expense." R. 155, A., I-A, 539-42; J.A. 145.

about the degree of sectarianism are not necessary.[64] This Court's prior cases involving government aid to religious institutions, from *Everson v. Board of Education*, 330 U.S. 1 (1947), to *Aguilar v. Felton*, 473 U.S. 402 (1985),[65] make clear that the heart of the effects analysis is not the pervasively sectarian inquiry, but whether the proffered assistance can reliably be limited to secular ends to ensure that a sectarian enterprise is not advanced.[66] Numerous AFLA grantees in this case *were* in fact "pervasively sectarian," but the AFLA program fails constitutional muster for two independent, analytically prior, reasons: The AFLA grants are not statutorily earmarked for solely secular purposes, and they are, in fact, earmarked for specifically sectarian tasks.

A. The AFLA Is Unconstitutional Because It Funds Specifically Religious Activity And Religious Institutions.

The district court found that both on its face and as applied the AFLA has a primary effect of advancing religion. J.S. App. 27a, 32a. Congress intended, and the statute explicitly requires, religious organizations to participate in AFLA programs as either grantees or as paid or unpaid participants.

Although 1982 grantees were told at an orientation conference that they could not teach religion, they were simultaneously told that they could base their programs on religious principles, that they should involve "churches," and that the AFLA was a joint project between churches and the federal government to promote chastity. J.A. 120-27, 163-64. The

64 In *Nyquist*, 413 U.S. 756, and *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973), the Court struck down various forms of state aid to parochial schools. The Court premised its decisions on the fact that the proffered aid could not be restricted to secular ends rather than on a finding that the schools were "pervasively sectarian."

65 The chart that appears as Appendix C to this brief suggests a framework for understanding this Court's government aid cases under the *Lemon* effects test.

66 Thus, in *Tilton v. Richardson*, 403 U.S. 672 (1971), the plurality *first* determined that the statute adequately segregated the funds and *then* stated that the plaintiff could therefore prevail only if he demonstrated that recipient institutions were "pervasively sectarian." *Id.* at 679-82.

written outline for the OAPP staff presentation to orient AFLA grantees in November 1982 stated:

> *Will this program succeed*? Churches have been involved in this area for a long time. Their efforts have not been 100% successful . . . . However, we do hope that through joint efforts between public and private entities including churches and the Federal Government we will have a significantly beneficial impact on the problems associated with adolescent pregnancy.

J.A. 163. This reinforced the unique and central theme of the legislation: to unite government and religion in a joint effort to promote sexual abstinence and adoption.

It is clear that the AFLA has a primary effect of advancing religion and is therefore unconstitutional under the second *Lemon* prong, because it funds "specifically religious activit[ies]." *Hunt v. McNair*, 413 U.S. 734, 743 (1973). This is not a case requiring the Court to predict the likelihood that government funds will be used for religious purposes;[67] the evidence is overwhelming that funds, in fact, advanced religion. Anne Ridder recalled that Reverend Creeden, speaking at one of the programs presented by Catholic Charities of the Diocese of Arlington, told parish adolescents and their parents:

> You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body

67 Appellants incorrectly cite *United States v. Salerno*, 95 L.Ed.2d 697 (1987), for the proposition that the AFLA must be deemed constitutional on its face unless plaintiffs "establish that no set of circumstances exists under which the Act would be valid." Gov. Br. 30. This standard does not apply to challenges based on the Establishment Clause; numerous cases have explained that the mere *risk* of establishment of religion is sufficient to warrant invalidation of a statute. *See Lemon v. Kurtzman*, 403 U.S. at 612 ("A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment") (emphasis in original); *Grand Rapids*, 473 U.S. at 388-89 ("[T]here is a 'substantial risk' that programs operating in this environment would 'be used for religious educational purposes'. . . . Thus, the lack of evidence of specific incidents of indoctrination is of little significance."). That is, the risk itself constitutes the Establishment Clause violation. *See also Meek v. Pittenger*, 421 U.S. 349, 370-72 (1975).

> of Christ. The teaching of you and the things you value are, in fact, the values of the Catholic Church.

J.A. 226. Certainly, appellants cannot deny that St. Margaret's used federal money to promote "the church's teaching" on sexuality, or that Catholic Charities of Arlington presented and facilitated a session on the church's teaching at every funded program, or that Catholic Family Services of Amarillo used a curriculum guide with explicit religious references. Nor can they deny that secular grantees like Charles Henderson and SeMo sought to strengthen and promote church teachings and institutions as a means of discouraging teenage sexuality and abortion. *See supra* pp. 9-22.

Moreover, plaintiffs proved that grantees used federal money to structure and then teach from curriculums that were designed to be compatible with particular religious beliefs. *Cf. Edwards v. Aguillard*, 96 L.Ed.2d 510, 520 (1987) (" '[T]eaching and learning' must not 'be tailored to the principles or prohibitions of any religious sect or dogma.' " (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)). St. Margaret's used a parochial school curriculum designed to promote Catholic doctrine. Its public school curriculum, based entirely on its parochial school one, was fundamentally the same. J.A. 411. Search Institute and St. Ann's developed curriculums directly derived from a pre-existing Catholic curriculum. St. Ann's used a curriculum that referred repeatedly to God and Christianity and also gave skewed information on contraceptives to conform with church teachings. J.A. 294-96, 316-17, 337, 350-53, 360-61, 363-64. SeMo "encourag[ed] churches to use sexuality education materials already available through their denomination[s]," J.A. 566, and Memorial General Hospital sponsored sessions that asked "How have our values changed since Christ's day?" R. 155, A., IV, 292.

The AFLA's impermissible effects are not limited to recipients of grants or subgrants. Those religious groups that are singled out to be AFLA participants or are AFLA advisory board members also gain a benefit by virtue of the government endorsement of their beliefs and of the power granted them by HHS or local government AFLA grantees to approve or shape AFLA programs or materials. When *only* Catholic or Protestant clergy are invited to be on the advisory committee of an

AFLA program, *see, e.g., id.* at 346, or when "conservative fundamentalist churches" are contacted first and targeted for special attention, J.A. 565-66, these religious groups also receive a government endorsement even though they do not receive funding.[68] *Cf. Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

By ensuring the involvement of religious groups in the teaching of specific sexuality values, the AFLA on its face impermissibly funds "specifically religious activity" under the AFLA program—an independent measure of the AFLA's unconstitutionality. It violates the "core rationale underlying the Establishment Clause [which] is preventing 'a fusion of governmental and religious functions.' " *Larkin*, 459 U.S. at 126 (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963)).[69]

The subject matter of AFLA programs heightens the risk of religious advancement. It may be that no subject is inherently "religious" or "secular" in all contexts. References to the afterlife or to the existence of a divine Creator acquire a different tenor from the pulpit than in a class on medieval philosophy. The subjects of the AFLA—intercourse, contraception, abortion—may not be forever and in all circumstances "religious" issues. But in the hands of religious institutions, often limited by adherence to religious authority on these very same issues,[70] acting on the instructions of a statute that

---

68 Of course, plaintiffs are not contending that the mere presence of a clergymember on a government-sponsored panel is constitutionally suspect.

69 *Cf. Schempp*, 374 U.S. at 281 (Brennan, J., concurring) ("While I do not question . . . that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.").

70 "There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching" of sexual education. *Edwards*, 96 L.Ed.2d at 523 (discussing evolution). In one book for teenagers used by an AFLA grantee for at least a year and a half, teenagers were taught "[t]he crucifixion was a passionate, symbolic, physical gesture of love as intercourse is." Intercourse is "the seal of a covenant that will last until

demands religious involvement—the risk that these subjects will be taught in a religious way is constitutionally unacceptable.[71]

As the district court noted, and based on plaintiffs' uncontroverted evidence, these issues are of fundamental religious importance. And in the public arena they have taken on special significance marking central denominational difference and strife.[72] "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws." *Walz v. Tax Comm'n*, 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

Intervenor argues that the centrality and divisive nature of sexuality issues to religious groups is irrelevant because "[v]irtually every activity conducted by religious organizations is related to their religious mission." Int. Br. 16-17.[73] It argues

---

death." "The good news about sex is that Jesus Christ has made it the expression of a level of love that is proper to God alone." R. 106, Ex. 15, 165-66, 174.

71 This case is plainly distinguishable from *Harris v. McRae*, 448 U.S. 297 (1980), where this Court found that the Hyde Amendment, which cut off Medicaid funds for abortion, did not violate the Establishment Clause because the congressional purpose could have been morally or ethically based. *Id.* at 319. The AFLA, however, involves funding religious organizations, for whom abortion is clearly a religious issue, in teaching anti-abortion values. Plaintiffs are *not* arguing, as was argued in *McRae*, that discouraging abortion is an unconstitutional religious purpose behind the AFLA. Plaintiffs argue only that government funding of religious groups to teach anti-abortion values creates an unconstitutional risk that religious values will be promoted.

72 Archbishop O'Connor, for example, has stated "I don't see how a Catholic in good conscience can vote for a candidate who explicitly supports abortion," N.Y. Times, June 25, 1984, § IV, at 13, and that abortion is his "No. 1 priority," National Catholic Rep., Feb. 10, 1984, at 20.

73 Furthermore, for the Catholic Church, issues of sexuality play a role of fundamental importance, treated at least in some ways differently than the issues of poverty and homelessness. For example, "procuring an abortion" is one of only seven "crimes" for which the penalty is automatic excommunication. In 1983, the Catholic Church reduced from 37 to 7 the number of "crimes" for which a Catholic would be automatically excommunicated. *The Code of Canon Law* 19 (J. Coriden, et al., ed. 1985). While "procuring an abortion" is included, failing to do enough to help the poor clearly is not a basis for automatic excommunication. The seven include: (1) "apostasy, heresy, schism"; (2) "violation of the consecrated species"; (3) "physical attack on the pope"; (4) "absolution of an accomplice in a sin against the Sixth Commandment"; (5) "unauthorized ordination of a bishop"; (6) "direct violation by a confessor of the seal of confession"; and (7) "procuring an abortion." J. Huels, *The Pastoral Companion* 135 (1986).

that under the district court's opinion religious organizations should be barred from programs to feed the hungry and house the poor "merely because these advance religious objectives at the same time that they achieve the government's secular purpose." *Id.* at 17. This analogy, however, fundamentally distorts the issues in this case. The proper analogy to the AFLA would be to a statute that funded sectarian groups to *teach* and *promote* their religious values on homelessness and hunger in the hopes that that indoctrination would help alleviate these social problems.[74]

B. The AFLA Is Unconstitutional Because It Lacks Any Statutory Safeguards.

It is undisputed that numerous AFLA grantees, subgrantees and participants are, in fact, "religious" by virtue of their affiliation, sponsorship, and stated policies. Yet the statute imposes absolutely no restriction on the ability of these religious grantees to use federal funds to further their own religious missions. The AFLA lacks the constitutionally mandated guarantee that granted funds will be used only for "secular, neutral, or nonideological" purposes.[75] The AFLA

---

74 Moreover, religious groups could not be funded to provide services that lose their purely secular status when given in accordance with specific religious dictates.

75 Government aid to a religious institution may be permissible if the aid is inherently "secular, neutral, and nonideological" and any assistance to the sectarian enterprise is merely "indirect, remote, or incidental." *E.g.*, *Nyquist*, 413 U.S. at 771, 780. Into this category falls the loan of secular textbooks to parochial school students, *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (state-provided textbooks were secular and provided equally to all school children); payment for bus transportation for parochial school stu-

gives money, for example, to Catholic organizations to promote adoption over abortion but nothing in the Act prohibits Catholic grantees from doing so by teaching that an embryo is infused with a soul from the moment of conception. As held by the district court, this alone renders the AFLA program unconstitutional. J.S. App. 29a & n.13, 31a.

This Court has held that Congress may not give cash grants to any religious institution without ensuring by statute that the grant will be used solely for secular purposes:

> In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Nyquist, 413 U.S. at 780; *see also Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (plurality opinion); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479-80 (1973); *Tilton v. Richardson*, 403 U.S. 672, 682-84 (1971) (plurality opinion). In *Tilton*, for example, this Court upheld federal construction grants to religious (but not "pervasively sectarian") colleges,[76] but only to the extent that grant restrictions prohibiting the use of buildings constructed with such funds for sectarian purposes remained effective; the Court declared invalid that part of the grant conditions that lifted such restrictions after twenty years.[77]

---

dents, *Everson*, 330 U.S. 1 (bus transportation was provided for all school children); diagnostic testing of parochial students, *Wolman v. Walter*, 433 U.S. 229 (1977) (nonpublic school controlled neither the content nor results of subsidized tests and diagnostic testing was performed by public personnel); and therapeutic services provided for such students off-premises by public employees, *id.*

76 The Court in *Tilton* specifically found that religion did not "so permeate[ ] secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." 403 U.S. at 680 (plurality opinion).

77 403 U.S. at 682-84. *See also Roemer*, 426 U.S. at 759-67 (plurality opinion), in which the relevant statute had been amended after *Lemon* to ensure that state aid was extended only to secular activities. The Court's opinion makes clear that the absence of such a provision would have led to a different result in *Roemer*. *See especially id.* at 767 n.23.

Appellants, understandably, do not deny the absence of statutory safeguards in the AFLA.[78] They assert that a clause in the grant award letter suffices because it prohibits grantees from using the funds to "teach or promote religion." This clause, inserted in grant letters only after this litigation was instituted, is wholly inadequate to correct the numerous constitutional problems recognized by the court below.

In an open-ended program like the AFLA, a prohibition on the "teaching or promotion of religion" is inadequate to ensure that funds be used only for secular purposes.[79] Diversion of funds to sectarian ends may be accomplished in many ways other than explicit "teaching or promotion." "Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics" or in one on sexual education. *Lemon*, 403 U.S. at 635 (Douglas, J., concurring). If "history can be given the gloss of a particular religion," so too can a course teaching specific sexuality values. *Id.* at 636.

Moreover, *Tilton*, 403 U.S. 672, insisted on *statutory* safeguards notwithstanding the fact that the Constitution demands the same result. The district court described the grant letter clause as "merely an unpublished administrative warning that was written at agency discretion and can be revoked by agent fiat." J.S. App. 29a n.13. The court properly concluded that "[n]o case permits a court to find that such a discretionary

---

78 That the absence of such a guarantee was not mere inadvertence, curable through a flexible reading of the statute, is clear from the Act's language, which requires religious involvement, J.S. App. 28a, 29a n.13, its legislative history, and the Act's numerous other prohibitions and restrictions on eligibility. *See supra* pp. 4-5. By contrast, the statutes in *Hunt v. McNair*, 413 U.S. 734, 741 (1973); *Tilton*, 403 U.S. at 676-77; and *Roemer*, 426 U.S. at 740, were grant authorizations of a general nature, available to all accredited institutions on a noncompetitive basis, and restrictions on the funding of sectarian activities were in fact the primary statutory limitation on eligibility.

79 Though to go further would unconstitutionally entangle government and religion. *See infra* pp. 45-53.

statement adequately protects against sectarian use of public funds." *Id.*[80]

Appellants' pale defense of the grant clause is most remarkable for its herculean effort to avoid the actual facts in this case. In an area of the law where even the *risk* of government-sponsored sectarian instruction is regarded as sufficient to warrant invalidation, the actual documentation of such activities by a substantial percentage of AFLA grantees speaks louder than any statutory exegesis. Whereas cases such as *Meek*, 421 U.S. 349, and *Grand Rapids*, 473 U.S. 373, involved no documented instances of religious indoctrination, repeated instances of religious indoctrination by AFLA grantees have been documented and are unrebutted. Of the 726 material facts submitted by the government in the district court, only four concerned monitoring and enforcement. No action taken ever investigated the degree of sectarianism of an institution, guaranteed the secular use of funds or recouped any of the tens of thousands of dollars of federal funds used to teach religion.[81]

Grantees, once funded, received no direction or supervision from HHS concerning regulating the religious content of the

---

80 The intervenor opines that the "AFLA grant conditions are similar to those attached to most federal grant projects," and then proceeds to cite three projects. Int. Br. 33-34. Those restrictions, however, were also located in a statute or regulation, making them quite unlike the Notice of Grant Award in this case. Intervenor is correct, however, in noting how common such *statutory* restrictions are in federal grant programs. *See, e.g.*, 20 U.S.C. § 27 (Vocational Educational Act); 20 U.S.C. § 241-1 (a)(1)(B), (a)(4) (Elementary and Secondary Education Act of 1965); 20 U.S.C. §§ 1021(c), 1062(b)(1), 1069c(1), 1070e-1(c)(2)(A)(ii), 1132g-3(c)(2), 1132i(c), 1134e(g) (Higher Education Act of 1965); 20 U.S.C. § 1210 (Adult Education Act); 20 U.S.C. § 3862(c)(2) (Education Act of 1965); 42 U.S.C. § 2753(b)(2)(C) (Work-Study Program); 42 U.S.C. § 5001(a)(2) (Retired Senior Volunteer Program).

81 For example, HHS never sought to recoup the funds given to Catholic Charities of Arlington and to St. Margaret's even though both programs used their funds to teach Catholic doctrine on sexuality. In fact, after their 1984-85 funding cycle, when CCDA was not re-funded by HHS, the sole reason was the "failure to make its program accessible to the public generally." J.A. 784, 742.

programs. R. 112, 529-30; J.A. 178.[82] OAPP grant conditions for 1982 and 1983 contained no restriction on religious use of AFLA money.[83] OAPP staff made site visits to AFLA classes in parochial schools and church parishes and received progress reports and continuation applications with statements or clippings submitted by grantees indicating extensive religious content and influence in funded programs. Nevertheless, the OAPP reports were devoid of any recognition or criticism of the evident constitutional implications of these facts. J.A. 170-71, 181, 184.[84]

It is no coincidence therefore that during the AFLA's entire existence, the only steps ever taken by HHS to ensure secular use of federal funds came in direct response to information revealed in this lawsuit and failed even then to meet constitutional mandates. *See supra* pp. 11 n.22, 14 n.29, 17 n.38, 18-19 & n.40.

C. The AFLA Is Unconstitutional Because It Funds "Pervasively Sectarian" Organizations.

Direct cash grants to "pervasively sectarian" institutions are impermissible no matter how carefully limited or nonideological the activity. "[N]o state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones." *Roemer*, 426 U.S. at 755

---

82 Despite repeated inquiry from OAPP staff, Mecklenburg issued no guidelines on how staff should judge or review curriculums or materials that grantees were supposed to submit to OAPP. R. 97, 77-79; R. 112, 520-21.

83 Nor did the grantees receive direction on the abortion restrictions which some viewed as a religious issue. J.A. 123-25.

84 For example, Sheeran admitted that he did not preview curriculum or other materials R. 57, 147-49, 154. Rosengard admitted making a site visit for St. Margaret's to a parochial school to see one of the AFLA prevention programs. R. 74, 95-96. Rosengard, however, had no concerns about religious involvement until February 1984 when asked to investigate their religious curriculum. R. 74, 90-91. Similarly, both OAPP Director Mecklenburg and Rosengard made site visits to St. Ann's without ever expressing concern about the religious symbols present or the influence of Catholic doctrine on the program. R. 92, 38-40; R. 93, 26-29; R. 60, 49-50.

(plurality opinion) (citing *Hunt v. McNair*, 413 U.S. 734 (1973)); *see also Grand Rapids*, 473 U.S. at 392-93.[85]

This Court has identified various factors by which to distinguish institutions that are "pervasively sectarian" (typically, parochial schools) from those that are not (typically, religiously affiliated colleges and universities). For example, does an atmosphere of "academic freedom" prevail, or are there religious restrictions on what may be taught? *Tilton*, 403 U.S. at 681-82. AFLA participants such as St. Margaret's,[86] St. Ann's, and Brigham Young University are plainly pervasively religious because of the comprehensive religious restrictions on what they may do and say. While the AFLA program purports to be "educational" in nature, the statutes, its administration and its grantees all reject "academic freedom." Counselors at St. Margaret's, for example, are not free to contradict Catholic teachings, nor are the adolescent counselees free to receive dissident views.[87]

---

85 In *Grand Rapids*, this Court noted that *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), permitting a subsidy for certain state-mandated testing services performed by nonpublic schools, was an exception to the general rule. 473 U.S. at 393. In *Regan*, "[t]he nonpublic school [had] no control whatsoever over the content of the tests" and there were "ample safeguards" against payments for sectarian services. 444 U.S. at 654, 659.

86 St. Margaret's, an obstetrical and gynecological hospital, which received a total of $1,879,118 from HHS, J.A. 754, must be considered pervasively sectarian under any criterion, because it has religious restrictions governing virtually all its reproductive health services and sexual education programs. J.A. 525-55.

87 Kim Maisenbacher, a nurse in St. Margaret's AFLA program stated in an affidavit: "In my employment interview I was told . . . that I would not be able to discuss either abortion or artificial family planning with my patients because to do so would breach the religious tenets of St. Margaret's. I was given a booklet entitled "Ethical and Religious Directives for Catholic Health Facilities" (Exhibit A). It was made clear to me that if the religious rules in this booklet were not followed I could lose my job." J.A. 550.

The district court found that certain AFLA grantees are "pervasively sectarian."[88] Appellants' assertion that the Court "did not consider whether the AFLA grantees (or any one of them, for that matter) are pervasively sectarian" is fatuous. Gov. Br. 45. The AFLA promotes religion in the three impermissible ways described by this Court in *Grand Rapids*:

> First, the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs. Second, the programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government in the support of the religious denomination operating the school. Third, the programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected.

473 U.S. at 385.

---

88 AFLA grantees and subgrantees have included several organizations with institutional ties to religious denominations and corporate requirements that the organizations abide by and not contradict religious doctrines. In addition, other recipients of AFLA funds, while not explicitly affiliated with a religious denomination, are religiously inspired and dedicated to teaching the dogma that inspired them. While the Court will not engage in an exhaustive recitation of the record, *references to representative portions of the record reveal the extent to which the AFLA has in fact* "directly and immediately" advanced religion, *funded "pervasively sectarian" institutions*, or permitted the use of federal tax dollars for education and counseling that amounts to the teaching of religion.

J.S. App. 33a (emphasis added). Subsequently, the court went on to say: "[T]he inescapable conclusion is that federal funds have been used by pervasively sectarian institutions to teach matters inherently tied to religion." *Id.* at 36a. Finally, the district court stated:

> In sum, the facts demonstrate beyond peradventure the effect of the Adolescent Family Life Act program. . . . In short, defendant has approved AFLA grants and distributed AFLA funds in a manner that advances religion, regardless of whether one looks for a "direct and immediate effect" of advancing religion, a benefit to a "pervasively sectarian" institution, or the use of tax dollars to "teach" religion.

Id. at 38a.

OAPP funded applications based on pre-existing religious programs using the same teachers and religious materials that ultimately appeared in the AFLA-sponsored curriculum. Clearly they *will* and *have* "become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."[89] Second, the impermissible "symbolic link" exists in this case. AFLA staff referred to the program as a "joint effort[ ] between . . . churches and the Federal Government," AFLA grantees publicly stated that their religious beliefs were funded by the government, and AFLA programs were conducted in parochial school classrooms, with all the accoutrements of sectarian education. *See supra* pp. 13-19, 22-24; *infra* p. 48 n.96. This endorsement also occurs when a secular grantee uses religious material[90] or utilizes nonpaid religious consultants or participants.[91] *Cf. Lynch v. Donnelly*, 465 U.S. 668, 691-94 (1984) (O'Connor, J., concurring). The constitutional difficulties with the government endorsement are magnified by the abortion-related restrictions on eligibility for AFLA grants which discriminate among religions.

Finally, the "impermissible subsidy of a primary religious mission"—the third criterion in *Grand Rapids*—is self-evident by virtue of the direct nature of the cash grant with no assurances of secular use.

The government's theory of pervasive sectarianism would require a remand for a factual finding of the degree of sectarianism for each and every AFLA grantee, subgrantee,

---

89 As this Court said in *Meek v. Pittenger*, "a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 371 (footnote omitted).

90 For example, the University of South Carolina put on a play in public schools where they presented the views of "the church" as anti-abortion. J.A. 580.

91 The University of South Carolina organized a "Ministers Action Coalition" with their AFLA funds, and designated churches as "special target areas for community intervention." R. 181, Vincent Decl. ¶ 7; R. 155, A., IV, 420. The Memorial Public Hospital used "Christian Education Teachers" as teachers of workshops. R. 155, A., IV, 294-98.

and non-funded participant. It ignores the over 1,200 admitted facts on the 1982 and 1983 grantees, J.A. 619, and demands "unfortunately" that plaintiffs start discovery anew on the current sixty-two grantees. Gov. Br. 33 n.26. The five-year cap on AFLA grant awards means that under the government's theory, review by this Court could be indefinitely avoided. § 300z-4(c)(1). Such a requirement would discourage, if not foreclose, challenges to government action respecting an establishment of religion, which this Court has recognized are of fundamental importance. *See Flast v. Cohen*, 392 U.S. 83 (1968).

Further, this Court has never required such a detailed itemization. For example, in *Meek v. Pittenger*, 421 U.S. 349 (1975), *aff'g in part and rev'g in part*, 374 F. Supp. 639 (E.D. Pa. 1974) (three-judge court), this Court invalidated Pennsylvania's Acts 194 and 195 as impermissibly aiding "religion-pervasive institutions," though the district court had made no finding of "pervasively sectarian" as to any individual recipient, nor even as to the schools taken as a whole. In fact, not all the recipient schools in *Meek* were religious schools, and this Court could go no farther than to say that the "very purpose of *many of those schools* is to provide an integrated secular and religious education." 421 U.S. at 364, 366 (emphasis added).

Finally, the statute does not exclude pervasively sectarian institutions from being involved with AFLA programs, as grantees or otherwise, nor has OAPP ever attempted to do so. J.A. 71-72. Even the possibility that, under the terms of the Act, pervasively sectarian institutions could be AFLA participants would render the Act unconstitutional.

II. THE AFLA FOSTERS EXCESSIVE ENTANGLEMENT BETWEEN GOVERNMENT AND RELIGION.

The third prong of the *Lemon* test is designed to prevent government from being put in a relationship of supervising the internal working of religions. Considering the virtually open-ended AFLA programs, the district court correctly concluded, "it is impossible to comprehend entanglement more extensive and continuous than that necessitated by the AFLA." J.S. App. 42a.

AFLA programs require vastly more on-going oversight than the Title I programs for remedial aid invalidated solely on this point in *Aguilar v. Felton*, 473 U.S. 402 (1985).[92] The statutory scheme in *Aguilar*, moreover, had seven safeguards not present in the AFLA: the teachers sent to parochial schools in *Aguilar* were under public control; remedial subjects were limited to math, English and reading; Title I services were available to all school children according to need; the teaching took place in "desanctified" classrooms; program instructional materials were the same as used in public schools; public school professionals were responsible for the selection of students; and Title I contained explicit statutory prohibitions against religious teaching. *Id.* at 406-07.

Excessive entanglement was found not only because of the "pervasively sectarian" atmosphere of the schools, but because assistance was "provided in the form of teachers [and] ongoing inspection is required to insure the absence of a religious message." *Id.* at 412. The Court also noted that the close "administrative cooperation" necessary to maintain the programs included judgments by the state "concern[ing] matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations." *Id.* at 413, 414.[93]

Although the government argues that entanglement concerns are "unwarranted" where institutions are not "pervasively sectarian," Gov. Br. 44, this Court has repeatedly held that the degree of sectarianism of an institution is to be considered "*cumulatively*" with the nature of the aid and the resulting relationship created between the state and the institution. *Roemer*, 426 U.S. at 766 (emphasis added); *see also Hunt*, 413 U.S. at 747.

---

92 In contrast to the AFLA, the Title I programs in *Aguilar* had been in effect for nineteen years with no evidence of religious indoctrination. 473 U.S. at 424 (O'Connor, J., dissenting).

93 *See also Lemon v. Kurtzman*, 403 U.S. at 619; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982); *Larson v. Valente*, 456 U.S. 228, 253 (1982); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. at 370.

A. The Degree Of Sectarianism Of An Institution Must Be Assessed In Light Of Its Religious Tenets Governing The Aid At Issue.

The government argues that the hospitals and maternity homes providing AFLA services are so "fully capable" of discharging services in a secular manner that ordinary monitoring is sufficient. Gov. Br. 21, 28, 44. This ignores the uncontroverted record, which demonstrates "beyond peradventure" that funds went to religious institutions "for purposes indistinguishable from their religious aims." J.S. App. 38a.[94] The relevant inquiry for assessing the constitutionality of funding sex education or the provision of reproductive health services in a religious context is whether there are religious restrictions on these activities, not what percentage of the total hospital services they comprise.[95]

The age of the audience and location of the programs are two additional factors in assessing the nature of an institution. This Court has found that college students are "less susceptible to religious indoctrination," so there is less need for surveillance. *Tilton*, 403 U.S. at 686-87. In contrast, some AFLA

---

94 The AFLA grant to the St. Ann's maternity home was used to double the number of teachers working under religious directives at the on-site high school whose principal reported to the Daughters of Charity. J.A. 305; R. 93, 53. St. Margaret's had a maternity home and school on its premises, St. Mary's, which used AFLA-funded social workers working under religious directives. R. 228, 6-7, 11-14. The teenagers attending the school were taught segments of the Family Life Course which were tailored to religious beliefs. R. 229, 58; R. 231, 110-11. The religious directives imposed on Catholic hospitals affected the care and counseling of all patients including teenagers in AFLA programs. J.A. 525-55.

95 Although the intervenor expresses concern that a Wisconsin program similar to the AFLA woud be "directly affect[ed]" by an affirmance in this case, Int. Br. 6 n.4., it neglects to point out that Wisconsin has addressed the problem of unconstitutional religious involvement in its program by issuing provisional regulations that define an organization as "pervasively sectarian" and ineligible for funds if *any* one of seven criterion apply, including the following:

> 5. The referral, counseling and/or teaching activities of the applicant are restricted to the religious doctrine of that organization;
> 6. The applicant has a statement prohibiting certain activities due to religious doctrine[.]

See Appendix C to brief.

programs have started as early as first grade, and the majority of programs are for teenagers, some of whom are pregnant and vulnerable. J.A. 551. Further, AFLA programs often take place in sectarian settings with religious symbols throughout. J.S. App. 36a.[96]

B. The Nature Of The Aid Provided Under AFLA Grants Requires Close And Entangling Supervision.

The district court found that the AFLA contemplates "one-on-one" counseling and "*teaching* by grant recipients and subcontractors" on subjects that are inseparable from religious dogma. J.S. App. 28a, 40a, 43a (emphasis in original).

Each program under the AFLA is under the control of grantees.[97] The programs all develop their own material, curriculum, counseling techniques, bibliographies, and guidelines. AFLA funds are used to pay for teachers, counselors and facilitators, including the salaries and training of religious personnel.[98] Even grantees who are funded for care grants include educational components. For example, St. Ann's care

96 This is true of both religious and secular grantees. For example, St. Margaret's Hospital has religious statues and symbols throughout, including in delivery rooms and some examining rooms, J.A. 531; Lyon County Health Department held classes at several churches and parochial schools, such as Sacred Heart Parochial School where religious symbols were on the walls, R. 155, A., IV, 238; and Tucson Unified School District subcontracted with, among others, St. Elizabeth of Hungary Clinic and Catholic Social Services, which have religious symbols such as crucifixes and/or pictures of St. Elizabeth visible in their waiting rooms and lobbies, *id.* 281-84.

97 The United States argued before this Court in *Aguilar v. Felton*, 473 U.S. 402 (1985), that:

> The correct line [for avoiding entanglement violations], we believe, is to permit federal aid to go on an evenhanded basis to all students as long as the provision of services is *strictly supplemental* and *totally in the control of public authorities*. . . . And the vice of excessive entanglement is avoided so long as there is no mixture or overlap of jurisdictions.

See Government's brief at 47 (emphasis added).

98 Federal tax monies are used to employ religious personnel at St. Margaret's and St. Ann's and to employ personnel who did work indistinguishable from other employees working at the religious institution. R. 155, A., II, 57-59; R. 155, A., III-A, 467-70, 508, 547; R. 155, A., VI, 236-37; *see also* R. 155, A., III, 37-38, 79, 81-84; R. 155, A., IV, 23-26.

project requires Family Life Education classes, and Cities in Schools provides adolescents with educational services supported by Here's Life Washington, a religious organization which provides "[i]ndividual counseling based on Scriptural principles." J.A. 572; R. 155, A., IV, 316-17, 321-26. Moreover, entanglement occurs not only between HHS and various grantees, but between those grantees that are state or local governments and their religious participants.[99]

This Court in *Lemon* examined the "potential for involving some aspect of faith or morals in secular subjects," 403 U.S. at 617, differentiating between the degree of supervision necessary with teachers as opposed to textbooks. Unlike the one-time construction grants upheld in *Tilton* as inherently nonideological in character, 403 U.S. at 687, the AFLA programs are designed to teach morals. The danger of religious indoctrination under the AFLA is therefore present in both the teaching materials and the teachers.[100]

Reviewing a Catholic grantee's teachings on contraception more clearly involves invading the "precinct of the church" than reviewing a secular math book. The monitoring necessary to "be certain" religious indoctrination does not creep into AFLA programs cannot be compared with an annual assessment of the amount of college fees, *Hunt v. McNair*, 413 U.S. 734 (1973), or the "quick and non-judgmental" annual audits of state funds required in *Roemer*, 426 U.S. at 743. As the district court stated, ensuring that religion is not promoted

99 For example, grantee Camden County Department of Health subcontracted with one group to build on its "linkages with several Catholic parishes" and on previous work presenting sex education programs in Catholic churches as well as public high schools. R. 155, A., IV, 185-86. Another subgrantee would provide an educational program based on one developed with the Family Life Bureau of the Diocese of Camden. *Id.* at 187, 187A-187C.

100 The Court, in *Meek v. Pittenger*, was alert to the fact that "the likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient . . . ." 421 U.S. at 370-71; *see also Wolman v. Walter*, 433 U.S. 229, 244 (1977), where this Court found a different degree of danger because "diagnostic services, unlike teaching or counseling, have little or no educational content."

"would require extensive and continuous monitoring and direct oversight of every counseling session." J.S. App. 42.

C. The AFLA Compromises The Integrity Of Both Government And Religion.

The First Amendment's requirement of a separation of Church and State is intended both to protect religion from being corrupted by the state and vice versa. *See generally* M. Howe, *The Garden and the Wilderness* (1967).[101] In *Lemon*, the Court saw inherent difficulties in the "possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions." 403 U.S. at 619. In this instance, HHS alleges that they are enforcing a grant condition ensuring that grantees do not "teach or *promote*" religion. J.A. 757. There is clearly disagreement about what constitutes "promoting" religion.[102] For example, is teaching a teenager that there are "no severe psychiatric consequences from carrying a pregnancy to term due to rape," J.A. 426, merely an accidental factual error or a deliberate attempt to promote a religious tenet against abortion? Another example occurred when a nurse midwife working in St. Margaret's AFLA program was reprimanded for contravening the hospital's religious views on sex when she answered "yes" to a teenager who asked whether she could have sex during pregnancy. J.A. 552.

---

101 *See, e.g., Roemer v. Board of Pub. Works*, 426 U.S. at 775 (Stevens, J., dissenting) (remarking on "the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it").

102 Sex education curriculums by grantee St. Margaret's were governed by the rules of the Boston Archdiocese that required them to be "based on Catholic teaching." J.A. 608. *See* J.A. 423-24; *supra* p. 18 nn.39, 40. Its curriculums claim that natural family planning is highly effective and has no side effects, but provide only abbreviated discussion of all other methods of contraception, listing numerous complications or side-effects while failing to mention the infrequency of their occurrence. *See* R. 155, A., II, 308-19; J.A. 422-26. Dr. Laz evaluated the curriculum and concluded that the "sections on family planning and abortion are biased, misleading, and contain many medical inaccuracies. . . . The curriculum is clearly designed to promote Catholic doctrine. . . ." J.A. 531-39. St. Ann's curriculum is not based on medicine either, but on doctrine. *See* J.A. 342-43, 350-53.

Several of the religiously affiliated grantees did attempt to remove some explicit religious content from their programs. For example, shortly after Search Institute received its grant notice, Rev. Forliti sent OAPP's deputy director a copy of an explicitly religious curriculum, which was returned without comment. Prior to depositions, however, Rev. Forliti's explicit references to religion and churches were deleted. R. 125, 119-25.[103] In some cases changes created internal religious dissension.[104]

D. The AFLA Creates Political Divisiveness.

Even if political divisiveness is seen as no more than "evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion," *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J. concurring), the AFLA has created such divisiveness.[105] The district court held that the AFLA would, for two reasons, "tend to incite political division along religious lines." First, the issues involved are central to religious doctrine and ones on which "religions' fundamental beliefs differ." *See supra* pp. 24-28, 35-37. Second, annual appropriations in this competitive grant scheme assure ongoing controversy and conflict.

---

103 Some grantees did apparently change their religious orientation in the belief this would help retain their AFLA funds. On September 17, 1984, Dr. James Dittes, a theology professor and advisory board member of AFLA grantee, Search Institute, affirmed that the Institute was religious. J.A. 556-58. After the trial court order, on May 8, 1987, Dr. Dittes asked that Search be reclassified as secular because of "major and sweeping changes in the organization." J.A. 624-25.

104 The Catholic newspaper *The Wanderer* published an article raising concerns about the propriety of Catholic Charities funds being used, together with AFLA funds, in a program that includes teaching about contraception "and will not teach nor promote religion." Potter, "Arlington Bishop Stonewalls on Propriety of Sex-Ed Course," *The Wanderer* (Apr. 11, 1985).

105 *See Meek*, 421 U.S. at 370-73; *Lemon*, 403 U.S. at 622-24; and *Nyquist*, 413 U.S. at 796-99. The Seventh Circuit invalidated a program of subgranting federal CETA workers to parochial schools because of the political divisiveness created by a competitive scheme similar to AFLA. *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980).

The fact that relatively few groups receive benefits under a government funded program[106] was identified as a warning signal of political divisiveness in *Lemon*, 403 U.S. at 623. The aid programs upheld by this Court, in contrast to the AFLA, involved fairly automatic, non-competitive grants either to both public and private entities, all school children or parents. *See, e.g., Mueller v. Allen*, 463 U.S. 388 (1983); *Roemer*, 426 U.S. 736. *See also Walz*, 397 U.S. 664 (tax exemption available across the board). AFLA funding decisions are made by the director of OAPP, whose decisions are only guided by scores given by readers.[107] Because secular grant applicants must show how they involve religious groups, they must compete for religious support and religions are given the power to influence who gets the federal grants.[108] Secular groups compete with religious groups, and certain religious groups are advantaged over others. As shown by the treatment of the University of Arkansas, *see supra* p. 31, the grant-making scheme "foster[s] the creation of political constituencies defined along religious lines." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

Furthermore, AFLA grants gave grantees political influence. The AFLA grant to St. Margaret's to build its religious curriculum enabled St. Margaret's to gain a foothold with the Boston public school board to develop sex education programs

106 Except for a small number of national projects, HHS had a two-per-state limit, and in fact in 1983 invited applications from the fifteen states without grantees. 48 Fed. Reg. 2917 (1983).

107 *See* 47 Fed. Reg. 8685 (1982). Ideological considerations influenced AFLA funding decisions. Sheeran, OAPP Program Officer for care and prevention grants, and Dr. Patricia Thompson, Program Officer for the AFLA research grants, both testified that Director Mecklenburg separately read them a list of organizations, including the American Bar Association, which "should not be funded by this [the Reagan] Administration." J.A. 118-19. Thompson was ordered to find a reason to avoid funding the Urban Institute, which received the second highest research score, for this reason. R. 108, 50-52.

108 For example, the OAPP explained to one applicant that it was rejected in part because "the lack of support from the Toledo Area Council of Churches weakened the proposal." R. 155, A., I-A, 505H.

for public schools. R. 185, Supp. A., 18, 23, 35-37.[109] The Charles Henderson Child Health Center used AFLA funds to lobby both the City of Troy and the Alabama House of Representatives to issue proclamations on Christianity and the family. R. 155, A., IV, 406-07.

In sum, AFLA participants' "standing in the political community" increased and the standing of others, such as the religious plaintiffs, diminished. *Lynch v. Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

III. APPELLANTS' ALTERNATIVE THEORIES CANNOT OBSCURE THE FACT THAT THE AFLA ADVANCES RELIGION AND FOSTERS EXCESSIVE ENTANGLEMENT.

Appellants devise a variety of novel standards for constitutionality under the Establishment Clause, all designed to test aid programs that are not even before the Court. These approaches are as disturbing in their disregard of prior case law as in their disregard of the facts of this case.

A. Labeling The AFLA A "Social Welfare Program" Does Not Exempt It From Scrutiny Under The Establishment Clause.

Appellants persistently avoid the actual facts of this case and seek instead to litigate the validity of other, very different, hypothetical programs. The Establishment Clause and this Court's prior cases provide limiting principles, an answer to appellants' parade of horribles. The *Lemon* test clearly recognizes that teaching a sex education program is constitutionally different than the distribution of surplus food or sheltering the homeless.

The very term "social welfare" as used by appellants is misleading. Just what activities this phrase is meant to describe remains a mystery. Schools, including parochial schools, provide not only education as such, but also social services for

109 Funding also helped grantees to become self sustaining once funding stopped. St. Margaret's, for example, charged parochial but not public schools for its AFLA programs. R. 231, 191-92. "Enclosed is a check for $250.00 . . . through the kindness of our Pastor Reverend F.X. Turke." J.A. 427.

their students. Appellants seek to create a sharp constitutional dividing line between such schools and institutions providing "social welfare services," but this line does not exist: the AFLA, for example, funds education, sometimes in parochial schools.[110] *See supra* pp. 9-19.

Moreover, these limiting principles do not prevent religious groups from operating freely in the realms that the First Amendment sought to leave intact: individual conscience, advocacy and activity. This case does not affect the right of religious institutions to perform social welfare functions or engage in good works. It concerns only the constitutionality of government subsidization of the religious enterprise. The phrase "social welfare" cannot be made a constitutional talisman when it ignores the fundamental reality behind the phrase.

The appellants insist that this case is governed by the 1899 case of *Bradfield v. Roberts*, 175 U.S. 291 (1899). In *Bradfield*, the Board of Commissioners of the District of Columbia had made, out of general funds appropriated by Congress, a $30,000 construction grant to a Catholic hospital that had been issued a charter of incorporation by Congress in 1864. This Court saw no Establishment Clause problem in *Bradfield* because the special, limited privilege of the corporate charter was read to ensure that the hospital was not a "sectarian" institution. *Bradfield*'s emphasis on "corporate powers," later termed "highly artificial" by one Justice, is itself of dubious contemporary authority. *Everson v. Board of Educ.*, 330 U.S. 1, 43 n.35 (1947) (Rutledge, J., dissenting). This nineteenth century charter in no way resembles the boilerplate language and routine process of contemporary charters of incorporation. Moreover, there is nothing in *Bradfield* to indicate that

110 The cases cited by the government, Gov. Br. 17, by no means support the proposition that there is a "historic partnership" of government and religious institutions. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983). All but two of the nine cases cited were decided on narrow state constitutional grounds. *Community Council v. Jordan*, 102 Ariz. 448, 432 P.2d 460 (1967), treated the state funding as payment to the child, not the institution, and cites *Everson* with *no* discussion. *Wilder v. Sugarman*, 385 F. Supp. 1013 (S.D.N.Y. 1974), and *Wilder v. Bernstein*, 645 F. Supp. 1291 (S.D.N.Y. 1986), cited by intervenors, Int. Br. 33, raise the free exercise rights of children in the context of foster care where the state is acting *in loco parentis*, *id.* at 1335, an issue not present here.

the grant would have been upheld if the hospital had been merely a private institution without corporate personality. And surely the religious grantees under AFLA are not merely "nonsectarian and secular corporation[s]."

But there is a more fundamental reason why *Bradfield* is different from this case, a reason explained by an apt concurring opinion in *Lemon* itself:

> The government may, of course, finance a hospital though it is run by a religious order, provided it is open to people of all races and creeds. [*Bradfield*] . . . The government itself could enter the hospital business; and it would, of course, make no difference if its agents who ran its hospital were Catholics, Methodists, agnostics, or whatnot. *For the hospital is not indulging in religious instruction or guidance or indoctrination.*

403 U.S. at 633 (Douglas, J., concurring) (emphasis added). The plaintiff's meagre allegations in *Bradfield* certainly did nothing to establish that the hospital was performing sectarian acts[111] or that it was "pervasively sectarian." The teaching, counseling and treatment of reproductive health matters under rigid religious dictates as subsidized by the AFLA, *see supra* pp. 19-22, are not comparable to a hospital constructing a diphtheria ward as Providence hospital was funded to do in 1899. *Government of the District of Columbia Annual Reports of the Commissioners*, 1874-1941, Report of Board of Health (1896, 1897).[112]

111 There is no small irony that appellants seek to find authority in *Bradfield*. The hospital whose grant was upheld in *Bradfield*, Providence Hospital, is the same Providence Hospital whose "Center for Life" program funded by AFLA is one of the most blatant examples of AFLA funds impermissibly advancing religion. J.S. App. 34a.

112 In eighty-eight years, this Court has cited *Bradfield* in only thirteen cases—only six times in majority or plurality opinions interpreting the Establishment Clause—and never for any assertion more specific than that "the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected." *Hunt*, 413 U.S. at 743; *see also Mueller*, 463 U.S. at 393; *Roemer*, 426 U.S. at 746; *Tilton*, 403 U.S. at 679.

B. AFLA Funding Of Religious Institutions And Religious Activities Is Not Neutral.

The intervenor asserts that the proper inquiry under the Establishment Clause is, or should be, "neutrality." However alluring in the abstract, the term "neutrality" does not by itself express the goal of the Establishment Clause, nor has it determined this Court's analysis in prior cases. From the criminal law to expenditures for the public welfare, public policy is predicated on distinctions—on departures from a strict "neutrality"—and the First Amendment throws the weight of the Constitution behind one such distinction: Governments may not exercise their broad spending power to make outright grants to religious institutions that so much as risk supporting the sectarian mission of those institutions.[113]

The intervenor quotes this Court's words in *Roemer*—"Neutrality is what is required. The state must confine itself to secular objectives, and neither advance nor impede religious activity"—but omits conveniently the words immediately following:

> Of course, that principle is more easily stated than applied. The Court has taken the view that *a secular purpose and a facial neutrality may not be enough, if in fact the state is lending direct support to a religious activity.* The State may not, for example, pay for what is actually a religious education, even though it purports to be paying for a secular one, *and even though it makes its aid available to secular and religious institutions alike.*

426 U.S. at 747 (plurality opinion) (emphasis added). This, and not mere "neutrality," is the crux of the matter.

---

113 There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. *That is a difference which the Constitution sets up between religion and almost every other subject of legislation, a difference which goes to the very root of religious freedom.* . . .

Everson, 330 U.S. at 26 (Jackson, J., dissenting) (emphasis added).

The intervenor's emphasis on equality in the receipt of material benefits,[114] which seems to regard religious institutions as mere economic competitors for government concessions, is a peculiar reading of the Establishment Clause. But the invocation of "neutrality" loses all force when one considers that the AFLA is decidedly *non*-neutral in at least four ways. First, by requiring religious involvement, the AFLA actually gives a non-neutral preference to religious organizations. Second, the AFLA is a competitive grant program, unlike the education cases in which aid was available to either all accredited institutions, all school children, or all nonpublic schools. Third, only religious organizations that adhere to certain beliefs regarding reproduction, abortion, and chastity are eligible for AFLA funding.[115] Finally, perhaps most importantly, AFLA is non-neutral in the sense that the ultimate beneficiaries, the targeted adolescents, are presented with government-sponsored, religiously dictated medical services and education, regardless of the personal religious beliefs of the adolescents. *See supra* pp. 9-22, 26-28; *Edwards v. Aguillard*, 96 L.Ed.2d 510 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

IV. THE ENTIRE AFLA MUST FALL DUE TO THE UNCONSTITUTIONAL RELIGIOUS INVOLVEMENT, AND THE STATUTE MAY NOT BE SEVERED.[116]

This Court has held that the relevant inquiry in deciding

---

114 The intervenor argues that the district court's judgment denies it the free exercise of religion by denying its members access to government-funded sex education consistent with their religious beliefs. Int. Br. 7. There is, however, no free exercise right to a government subsidy for religious education, *Nyquist*, 413 U.S. at 782 n.38. Moreover, even if this Court were to recognize the free exercise right asserted by intervenor, it would have to weigh that claim against the free exercise rights of all those, including patients in Catholic hospitals governed by *Religious Directives*, who were compelled to follow these *Directives* as a condition for participating in a government program. J.A. 541. *See Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).

115 This Court has stated, "[t]he clearest command of the Establishment Clause is that one denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

116 This cross-appeal is joined by all plaintiffs except the American Jewish Congress.

whether or not to sever an unconstitutional provision from a statute is *not* whether the statute could continue to operate absent the invalid provision, but is "whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines v. Brock*, 107 S. Ct. 1476, 1480-81 (1987) (emphasis in original);[117] *see also City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987). This Court has also stated that when the unconstitutional and constitutional portions of a statute "are necessary parts of one system . . . the whole Act will fall with the invalidity of one clause. When there is no such connection and dependency, the Act will stand . . . ." *Huntington v. Worthen*, 120 U.S. 97, 102 (1887); *accord Field v. Clark*, 143 U.S. 649, 695-96 (1892); *see also Hill v. Wallace*, 259 U.S. 44, 70-72 (1922). The AFLA clearly does not meet these requirements for severability.

A primary reason that Congress enacted the AFLA to replace Title VI was to inject the teaching of certain religiously sensitive values about sexuality and involve religious organizations in the teaching of those values. *See supra* pp. 2-4. One of the few principal differences between the AFLA and Title VI is that the AFLA repeatedly lists religious groups as specifically desired participants. Congress added references to religious organizations at four places throughout the AFLA, making religious organizations eligible for direct AFLA grants and requiring *all* grantees to involve religious organizations in their

117 *Alaska Airlines* is the only case on which the district court relied in severing the AFLA. In *Alaska Airlines*, this Court considered whether an unconstitutional legislative veto provision could be severed from the Airline Deregulation Act. The Court severed the legislative veto, noting it was by "its very nature . . . separate from the operation of the substantive provisions of a statute," 107 S. Ct. at 1480, and covered only "insignificant" aspects of the Act, *id.* at 1482. By contrast, the Court described the Act itself as a "major change" and "fundamental redirection" in the regulation of air transportation. *Id.* at 1478.

The AFLA is factually distinguishable from the Act in *Alaska Airlines* on all of these points. The inclusion of religious organizations is interwoven throughout the AFLA, is mandated in all funded programs and was a primary reason that Congress enacted the AFLA to replace Title VI. Also, the AFLA is a small experimental program, one of approximately forty-three federal programs, guarantees or protections designed to help pregnant adolescents and their families. *See* Moore, *Adolescent Parents: Federal Programs and Policies* (Summer 1983).

programs. Thus, Congress clearly viewed the participation of religious organizations as vital to the success of AFLA programs and would not have replaced Title VI absent the religious involvement.[118]

Moreover, to the extent that the legislative intent is unclear, this Court has ruled that "if the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall." *El Paso Northeastern Ry. v. Gutierrez*, 215 U.S. 87, 97 (1909).

Courts also consider how the statute has actually operated to infer legislative intent. *See Meek v. Pittenger*, 421 U.S. at 363-65; *Sloan v. Lemon*, 413 U.S. 825, 830 (1973). The extensive involvement of religious organizations and promotion of religious beliefs in AFLA programs further demonstrate the inseparability of the religious sections in the statute. *See supra* pp. 6-24. Furthermore, because the AFLA has been unconstitutionally promoting religion for over six years, the surveillance needed to prevent the government promotion of religion under a severed AFLA would itself create unconstitutional "excessive and enduring entanglement." *Lemon*, 403 U.S. at 619.

Finally, the district court not only improperly severed language appearing throughout the statute,[119] but also in effect wrote into the Act an injunction prohibiting funding of religious organizations. J.S. App. 48a. As this Court explained in *Hill v. Wallace*, it is beyond the scope of judicial duty to ensure severability by "dissect[ing] an unconstitutional measure and refram[ing] a valid one . . . by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court." 259 U.S. at 70.

118 The absence of both a severability clause and assurances that funds must be used only for secular purposes further indicates that Congress intended religion to be an inseparable part of the AFLA.

119 The district court ordered the cessation of the participation of religious organizations in the AFLA that was occurring at the time of the order. Contrary to the government's assertion, the court did not rest the order on the premise that all religious organizations are the same. Gov. Br. 31. Rather the court properly put the burden on the government to decide what is and what is not religious, as it is obliged to do in other regulatory contents. R. 303, 35-38.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order declaring the Adolescent Family Life Act unconstitutional both on its face and as applied, and reverse the district court's order on severability.

Respectfully submitted,

JANET BENSHOOF
(Counsel of Record)
LYNN M. PALTROW
DAWN JOHNSEN
NAN D. HUNTER
RACHAEL N. PINE
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

BRUCE J. ENNIS, JR.
Ennis Friedman & Bersoff
1200 17th St., N.W.
Suite 400
Washington, D.C. 20053
(202) 775-8100

Attorneys for Appellees and Cross Appellants

APPENDIX

EXHIBIT A

SUBCHAPTER XX—ADOLESCENT FAMILY LIFE DEMONSTRATION PROJECTS

300z. Findings and purposes

a) The Congress finds that—

(1) In 1978, an estimated one million one hundred thousand teenagers became pregnant, more than five hundred thousand teenagers carried their babies to term, and over one-half of the babies born to such teenagers were born out of wedlock;

(2) adolescents aged seventeen and younger accounted for more than one-half of the out of wedlock births to teenagers;

(3) in a high proportion of cases, the pregnant adolescent is herself the product of an unmarried parenthood during adolescence and is continuing the pattern in her own lifestyle;

(4) it is estimated that approximately 80 per centum of unmarried teenagers who carry their pregnancies to term live with their families before and during their pregnancy and remain with their families after the birth of the child;

(5) pregnancy and childbirth among unmarried adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low birth weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that an adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;

(6)(A) adoption is a positive option for unmarried pregnant adolescents who are unwilling or unable to care for their children since adoption is a means of providing permanent families for such children from available approved couples who are unable or have difficulty in conceiving or carrying children of their own to term; and

(B) at present, only 4 per centum of unmarried pregnant adolescents who carry their babies to term enter into an adoption plan or arrange for their babies to be cared for by relatives or friends;

(7) an unmarried adolescent who becomes pregnant once is likely to experience recurrent pregnancies and childbearing, with increased risks;

(8)(A) the problems of adolescent premarital sexual relations, pregnancy, and parenthood are multiple and complex and are frequently associated with or are a cause of other troublesome situations in the family; and

(B) such problems are best approached through a variety of integrated and essential services provided to adolescents and their families by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(9) a wide array of educational, health, and supportive services are not available to adolescents with such problems or to their families, or when available frequently are fragmented and thus are of limited effectiveness in discouraging adolescent premarital sexual relations and the consequences of such relations;

(10)(A) prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties, and since the family is the basic social unit in which the values and attitudes of adolescents concerning sexuality and pregnancy are formed, programs designed to deal with issues

of sexuality and pregnancy will be successful to the extent that such programs encourage and sustain the role of the family in dealing with adolescent sexual activity and adolescent pregnancy;

(B) Federal policy therefore should encourage the development of appropriate health, educational, and social services where such services are now lacking or inadequate, and the better coordination of existing services where they are available; and

(C) services encouraged by the Federal Government should promote the involvement of parents with their adolescent children, and should emphasize the provision of support by other family members, religious and charitable organizations, voluntary associations, and other groups in the private sector in order to help adolescents and their families deal with complex issues of adolescent premarital sexual relations and the consequences of such relations; and

(11)(A) there has been limited research concerning the societal causes and consequences of adolescent pregnancy;

(B) there is limited knowledge concerning which means of intervention are effective in mediating or eliminating adolescent premarital sexual relations and adolescent pregnancy; and

(C) it is necessary to expand and strengthen such knowledge in order to develop an array of approaches to solving the problems of adolescent premarital sexual relations and adolescent pregnancy in both urban and rural settings.

(b) Therefore, the purposes of this subchapter are—

(1) to find effective means, within the context of the family, of reaching adolescents before they become sexually active in order to maximize the guidance and support available to adolescents from parents and other family

members, and to promote self discipline and other prudent approaches to the problem of adolescent premarital sexual relations, including adolescent pregnancy;

(2) to promote adoption as an alternative for adolescent parents;

(3) to establish innovative, comprehensive, and integrated approaches to the delivery of care services for pregnant adolescents, with primary emphasis on unmarried adolescents who are seventeen years of age or under, and for adolescent parents, which shall be based upon an assessment of existing programs and, where appropriate, upon efforts to establish better coordination, integration, and linkages among such existing programs in order to—

(A) enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life; and

(B) assist families of adolescents to understand and resolve the societal causes which are associated with adolescent pregnancy;

(4) to encourage and support research projects and demonstration projects concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing;

(5) to support evaluative research to identify effective services which alleviate, eliminate, or resolve any negative consequences of adolescent premarital sexual relations and adolescent childbearing for the parents, the child, and their families; and

(6) to encourage and provide for the dissemination of results, findings, and information from programs and research projects relating to adolescent premarital sexual relations, pregnancy, and parenthood.

(July 1, 1944, c. 373, Title XX, § 2001, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 578.)

§ 300z-1. Definitions; regulations applicable

(a) For the purposes of this subchapter the term—

(1) "Secretary" means the Secretary of Health and Human Services;

(2) "eligible person" means—

(A) with regard to the provision of care services, a pregnant adolescent, an adolescent parent, or the family of a pregnant adolescent or an adolescent parent; or

(B) with regard to the provision of prevention services and referral to such other services which may be appropriate, a non-pregnant adolescent;

(3) "eligible grant recipient" means a public or nonprofit private organization or agency which demonstrates, to the satisfaction of the Secretary—

(A) in the case of an organization which will provide care services, the capability of providing all core services in a single setting or the capability of creating a network through which all core services would be provided; or

(B) in the case of an organization which will provide prevention services, the capability of providing such services;

(4) "necessary services" means services which may be provided by grantees which are—

(A) pregnancy testing and maternity counseling;

(B) adoption counseling and referral services which present adoption as an option for pregnant adolescents, including referral to licensed adoption

agencies in the community if the eligible grant recipient is not a licensed adoption agency;

(C) primary and preventive health services including prenatal and postnatal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services relating to family life and problems associated with adolescent premarital sexual relations, including—

(i) information about adoption;

(ii) education on the responsibilities of sexuality and parenting;

(iii) the development of material to support the role of parents as the provider of sex education; and

(iv) assistance to parents, schools, youth agencies, and health providers to educate adolescents and preadolescents concerning self-discipline and responsibility in human sexuality;

(H) appropriate educational and vocational services and referral to such services;

(I) referral to licensed residential care or maternity home services; and

(J) mental health services and referral to mental health services and to other appropriate physical health services;

(K) child care sufficient to enable the adolescent parent to continue education or to enter into employment;

(L) consumer education and homemaking;

(M) counseling for the immediate and extended family members of the eligible person;

(N) transportation;

(O) outreach services to families of adolescents to discourage sexual relations among unemancipated minors;

(P) family planning services; and

(Q) such other services consistent with the purposes of this subchapter as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(5) "core services" means those services which shall be provided by a grantee, as determined by the Secretary by regulation;

(6) "supplemental services" means those services which may be provided by a grantee, as determined by the Secretary by regulation;

(7) "care services" means necessary services for the provision of care to pregnant adolescents and adolescent parents and includes all core services with respect to the provision of such care prescribed by the Secretary by regulation;

(8) "prevention services" means necessary services to prevent adolescent sexual relations, including the services described in subparagraphs (A), (D), (E), (G), (H), (M), (N), (O), and (Q) of paragraph (4);

(9) "adolescent" means an individual under the age of nineteen; and

(10) "unemancipated minor" means a minor who is subject to the control, authority, and supervision of his or her parents or guardians, as determined under State law.

(b) Until such time as the Secretary promulgates regulations pursuant to the second sentence of this subsection, the Secretary shall use the regulations promulgated under Title VI of the Health Services and Centers Amendments of 1978 which were in effect on August 13, 1981, to determine which necessary services are core services for purposes of this subchapter. The Secretary may promulgate regulations to determine which necessary services are core services for purposes of this subchapter based upon an evaluation of and information concerning which necessary services are essential to carry out the purposes of this subchapter and taking into account (1) factors such as whether services are to be provided in urban or rural areas, the ethnic groups to be served, and the nature of the populations to be served, and (2) the results of the evaluations required under section 300z-5(b) of this title. The Secretary may from time to time revise such regulations.

(July 1, 1944, c. 373, Title XX, § 2002, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 580.)

§ 300z-2. Demonstration projects; grant authorization, etc.

(a) The Secretary may make grants to further the purposes of this subchapter to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 300z-5 of this title for demonstration projects which the Secretary determines will help communities provide appropriate care and prevention services in easily accessible locations. Demonstration projects shall, as appropriate, provide, supplement, or improve the quality of such services. Demonstration projects shall use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents and to make use of support systems such as other family members, friends, religious and charitable organizations, and voluntary associations.

(b) Grants under this subchapter for demonstration projects may be for the provision of—

(1) care services;

(2) prevention services; or

(3) a combination of care services and prevention services.

(July 1, 1944, c. 373, Title XX, § 2003, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 582.)

§ 300z-3. Uses of grants for demonstration projects for services

COVERED PROJECTS

(a) Except as provided in subsection (b) of this section, funds provided for demonstration projects for services under this subchapter may be used by grantees only to—

(1) provide to eligible persons—

(A) care services;

(B) prevention services; or

(C) care and prevention services (in the case of a grantee who is providing a combination of care and prevention services);

(2) coordinate, integrate, and provide linkages among providers of care, prevention, and other services for eligible persons in furtherance of the purposes of this subchapter;

(3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent premarital sexual relations and adolescent pregnancy;

(4) plan for the administration and coordination of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents which will further the objectives of this subchapter; and

(5) fulfill assurances required for grant approval by section 300z-5 of this title.

FAMILY PLANNING SERVICES; AVAILABILITY IN COMMUNITY

(b)(1) No funds provided for a demonstration project for services under this subchapter may be used for the provision of family planning services (other than counseling and referral services) to adolescents unless appropriate family planning services are not otherwise available in the community.

(2) Any grantee who receives funds for a demonstration project for services under this subchapter and who, after determining under paragraph (1) that appropriate family planning services are not otherwise available in the community, provides family planning services (other than counseling and referral services) to adolescents may only use funds provided under this subchapter for such family planning services if all funds received by such grantee from all other sources to support such family planning services are insufficient to support such family planning services.

FEES FOR SERVICES: CRITERIA

(c) Grantees who receive funds for a demonstration project for services under this subchapter shall charge fees for services pursuant to a fee schedule approved by the Secretary as a part of the application described in section 300z-5 of this title which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. A grantee who receives funds for a demonstration project for services under this subchapter may not, in any case, discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services, except that in determining the ability of an unemancipated minor to provide payment for services, the income of the family of an unemancipated minor shall be considered in determining the ability of such minor to make such payments unless the parents or

guardians of the unemancipated minor refuse to make such payments.

(July 1, 1944, c. 373, Title XX, § 2004, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 583.)

§ 300z-4. Grants for demonstration projects for services

PRIORITIES

(a) In approving applications for grants for demonstration projects for services under this subchapter, the Secretary shall give priority to applicants who—

(1) serve an area where there is a high incidence of adolescent pregnancy;

(2) serve an area with a high proportion of low-income families and where the availability of programs of care for pregnant adolescents and adolescent parents is low;

(3) show evidence—

(A) in the case of an applicant who will provide care services, of having the ability to bring together a wide range of needed core services and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for pregnant adolescents or adolescent parents; or

(B) in the case of an applicant who will provide prevention services, of having the ability to provide prevention services for adolescents and their families which are appropriate for the target population and the geographic area to be served, including the special needs of rural areas;

(4) will utilize to the maximum extent feasible existing available programs and facilities such as neighborhood

and primary health care centers, maternity homes which provide or can be equipped to provide services to pregnant adolescents, agencies serving families, youth, and children with established programs of service to pregnant adolescents and vulnerable families, licensed adoption agencies, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the demonstration project non-Federal funds, personnel, and facilities;

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the demonstration project; and

(8) will demonstrate innovative and effective approaches in addressing the problems of adolescent premarital sexual relations, pregnancy, or parenthood, including approaches to provide pregnant adolescents with adequate information about adoption.

FACTORS TO BE CONSIDERED IN MAKING GRANTS; SPECIAL NEEDS OF RURAL AREAS

(b)(1) The amount of a grant for a demonstration project for services under this subchapter shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents in such area.

(2) In making grants for demonstration projects for services under this subchapter, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds taking into consideration the relative number of adolescents in such areas in need of such services.

DURATION: FEDERAL SHARE

(c)(1) A grantee may not receive funds for a demonstration project for services under this subchapter for a period in excess of 5 years.

(2)(A) Subject to paragraph (3), a grant for a demonstration project for services under this subchapter may not exceed—

(i) 70 per centum of the costs of the project for the first and second years of the project;

(ii) 60 per centum of such costs for the third year of the project;

(iii) 50 per centum of such costs for the fourth year of the project; and

(iv) 40 per centum of such costs for the fifth year of the project.

(B) Non-Federal contributions required by subparagraph (A) may be in cash or in kind, fairly evaluated, including plant, equipment, or services.

(3) The Secretary may waive the limitation specified in paragraph (2)(A) for any year in accordance with criteria established by regulation.

(July 1, 1944, c. 373, Title XX, § 2005, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 584.)

§ 300z-5. Requirements for applications

FORM, CONTENT, AND ASSURANCES

(a) An application for a grant for a demonstration project for services under this subchapter shall be in such form and contain such information as the Secretary may require, and shall include—

(1) an identification of the incidence of adolescent pregnancy and related problems;

(2) a description of the economic conditions and income levels in the geographic area to be served;

(3) a description of existing pregnancy prevention services and programs of care for pregnant adolescents and adolescent parents (including adoption services), and including where, how, by whom, and to which population groups such services are provided, and the extent to which they are coordinated in the geographic area to be served;

(4) a description of the major unmet needs for services for adolescents at risk of initial or recurrent pregnancies and an estimate of the number of adolescents not being served in the area;

(5)(A) in the case of an applicant who will provide care services, a description of how all core services will be provided in the demonstration project using funds under this subchapter or will otherwise be provided by the grantee in the area to be served, the population to which such services will be provided, how such services will be coordinated, integrated, and linked with other related programs and services and the source or sources of funding of such core services in the public and private sectors; and

(B) in the case of an applicant who will provide prevention services, a description of the necessary services to be provided and how the applicant will provide such services;

(6) a description of the manner in which adolescents needing services other than the services provided directly by the applicant will be identified and how access and appropriate referral to such other services (such as medicaid; licensed adoption agencies; maternity home services; public assistance; employment services; child care services for adolescent parents; and other city, county, and State programs related to adolescent pregnancy) will be provided, including a description of a plan to coordinate such other services with the services supported under this subchapter;

(7) a description of the applicant's capacity to continue services as Federal funds decrease and in the absence of Federal assistance;

(8) a description of the results expected from the provision of services, and the procedures to be used for evaluating those results;

(9) a summary of the views of public agencies, providers of services, and the general public in the geographic area to be served, concerning the proposed use of funds provided for a demonstration project for services under this subchapter and a description of procedures used to obtain those views, and, in the case of applicants who propose to coordinate services adminstered by a State, the written comments of the appropriate State officials responsible for such services,

(10) assurances that the applicant will have an ongoing quality assurance program;

(11) assurances that, where appropriate, the applicant shall have a system for maintaining the confidentiality of patient records in accordance with regulations promulgated by the Secretary;

(12) assurances that the applicant will demonstrate its financial responsibility by the use of such accounting procedures and other requirements as may be prescribed by the Secretary;

(13) assurances that the applicant (A) has or will have a contractual or other arrangement with the agency of the State (in which the applicant provides services) that administers or supervises the administration of a State plan approved under title XIX of the Social Security Act for the payment of all or a part of the applicant's costs in providing health services to persons who are eligible for medical assistance under such a State plan, or (B) has made or will make every reasonable effort to enter into such an arrangement;

(14) assurances that the applicant has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to benefits under title V of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any other public assistance program or private health insurance program;

(15) assurances that the applicant has or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing services to persons entitled to services under parts B and E of title IV and title XX of the Social Security Act;

(16)(A) a description of—

(i) the schedule of fees to be used in the provision of services, which shall comply with section 300z-3(c) of this title and which shall be designed to cover all reasonable direct and indirect costs incurred by the applicant in providing services; and

(ii) a corresponding schedule of discounts to be applied to the payment of such fees, which shall comply with section 300z-3(c) of this title and which shall be adjusted on the basis of the ability of the eligible person to pay;

(B) assurances that the applicant has made and will continue to make every reasonable effort—

(i) to secure from eligible persons payment for services in accordance with such schedules;

(ii) to collect reimbursement for health or other services provided to persons who are entitled to have payment made on their behalf for such services under any Federal or other government program or private insurance program; and

(iii) to seek such reimbursement on the basis of the full amount of fees for services without application of any discount; and

(C) assurances that the applicant has submitted or will submit to the Secretary such reports as the Secretary may require to determine compliance with this paragraph;

(17) assurances that the applicant will make maximum use of funds available under subchapter VIII of this chapter;

(18) assurances that the acceptance by any individual of family planning services or family planning information (including educational materials) provided through financial assistance under this subchapter shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service furnished by the applicant;

(19) assurances that fees collected by the applicant for services rendered in accordance with this subchapter shall be used by the applicant to further the purposes of this subchapter;

(20) assurances that the applicant, if providing both prevention and care services will not exclude or discriminate against any adolescent who receives prevention services and subsequently requires care services as a pregnant adolescent;

(21) a description of how the applicant will, as appropriate in the provision of services—

(A) involve families of adolescents in a manner which will maximize the role of the family in the solution of problems relating to the parenthood or pregnancy of the adolescent;

(B) involve religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives;

(22)(A) assurances that—

(i) except as provided in subparagraph (B) and subject to clause (ii), the applicant will notify the parents or guardians of any unemancipated minor requesting services from the applicant and, except as provided in subparagraph (C), will obtain the permission of such parents or guardians with respect to the provision of such services; and

(ii) in the case of a pregnant unemancipated minor requesting services from the applicant, the applicant will notify the parents or guardians of such minor under clause (i) within a reasonable period of time;

(B) assurances that the applicant will not notify or request the permission of the parents or guardian of any unemancipated minor without the consent of the minor—

(i) who solely is requesting from the applicant pregnancy testing or testing or treatment for venereal disease;

(ii) who is the victim of incest involving a parent; or

(iii) if an adult sibling of the minor or an adult aunt, uncle, or grandparent who is related to the minor by blood certifies to the grantee that notification of the parents or guardians of such minor would result in physical injury to such minor; and

(C) assurances that the applicant will not require, with respect to the provision of services, the permission of the parents or guardians of any pregnant unemancipated minor if such parents or guardians are attempting to compel such minor to have an abortion;

(23) assurances that primary emphasis for services supported under this subchapter shall be given to adolescents seventeen and under who are not able to obtain needed assistance through other means;

(24) assurances that funds received under this subchapter shall supplement and not supplant funds received from any other Federal, State, or local program or any private sources of funds; and

(25) a plan for the conduct of, and assurances that the applicant will conduct, evaluations of the effectiveness of the services supported under this subchapter in accordance with subsection (b) of this section.

EVALUATIONS: AMOUNT, CONDUCT, AND TECHNICAL ASSISTANCE

(b)(1) Each grantee which receives funds for a demonstration project for services under this subchapter shall expend at least 1 per centum but not in excess of 5 per centum of the amounts received under this subchapter for the conduct of evaluations of the services supported under this subchapter. The Secretary may, for a particular grantee upon good cause shown, waive the provisions of the preceding sentence with respect to the amounts to be expended on evaluations, but may not waive the requirement that such evaluations be conducted.

(2) Evaluations required by paragraph (1) shall be conducted by an organization or entity which is independent of the grantee providing services supported under this subchapter. To assist in conducting the evaluations required by paragraph (1), each grantee shall develop a working relationship with a college or university located in the grantee's State which will provide or assist in providing monitoring and evaluation of services supported under this subchapter unless no college or university in the grantee's State is willing or has the capacity to provide or assist in providing such monitoring and assistance.

(3) The Secretary may provide technical assistance with respect to the conduct of evaluations required under this subsection to any grantee which is unable to develop a working relationship with a college or university in the applicant's State for the reasons described in paragraph (2).

REPORTS

(c) Each grantee which receives funds for a demonstration project for services under this subchapter shall make such reports concerning its use of Federal funds as the Secretary may require. Reports shall include, at such times as are considered appropriate by the Secretary, the results of the evaluations of the services supported under this subchapter.

NOTIFICATION OF PARENTS; DEFINITION

(d)(1) A grantee shall periodically notify the Secretary of the exact number of instances in which a grantee does not notify the parents or guardians of a pregnant unemancipated minor under subsection (a)(22)(B)(iii) of this section.

(2) For purposes of subsection (a)(22)(B)(iii) of this section, the term "adult" means an adult as defined by State law.

SUBMISSION OF APPLICATIONS TO GOVERNOR; COMMENTS BY GOVERNOR

(e) Each applicant shall provide the Governor of the State in which the applicant is located a copy of each application

submitted to the Secretary for a grant for a demonstration project for services under this subchapter. The Governor shall submit to the applicant comments on any such application within the period of sixty days beginning on the day when the Governor receives such copy. The applicant shall include the comments of the Governor with such application.

AVAILABILITY OF CORE SERVICES

(f) No application submitted for a grant for a demonstration project for care services under this subchapter may be approved unless the Secretary is satisfied that core services shall be available through the applicant within a reasonable time after such grant is received.

(July 1, 1944, c. 373, Title XX, § 2006, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 585.)

§ 300z-6. Coordination of programs

(a) The Secretary shall coordinate Federal policies and programs providing services relating to the prevention of adolescent sexual relations and initial and recurrent adolescent pregnancies and providing care services for pregnant adolescents. In achieving such coordination, the Secretary shall—

(1) require grantees who receive funds for demonstration projects for services under this subchapter to report periodically to the Secretary concerning Federal, State, and local policies and programs that interfere with the delivery of and coordination of pregnancy prevention services and other programs of care for pregnant adolescents and adolescent parents;

(2) provide technical assistance to facilitate coordination by State and local recipients of Federal assistance;

(3) review all programs administered by the Department of Health and Human Services which provide prevention services or care services to determine if the policies of such programs are consistent with the policies

of this subchapter, consult with other departments and agencies of the Federal Government who administer programs that provide such services, and encourage such other departments and agencies to make recommendations, as appropriate, for legislation to modify such programs in order to facilitate the use of all Government programs which provide such services as a basis for delivery of more comprehensive prevention services and more comprehensive programs of care for pregnant adolescents and adolescent parents;

(4) give priority in the provision of funds, where appropriate, to applicants using single or coordinated grant applications for multiple programs; and

(5) give priority, where appropriate, to the provision of funds under Federal programs administered by the Secretary (other than the program established by this subchapter) to projects providing comprehensive prevention services and comprehensive programs of care for pregnant adolescents and adolescent parents.

(b) Any recipient of a grant for a demonstration project for services under this subchapter shall coordinate its activities with any other recipient of such a grant which is located in the same locality.

(July 1, 1944, c. 373, Title XX, § 2007, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-7. Research

GRANTS AND CONTRACTS; DURATION, RENEWAL; AMOUNT

(a)(1) The Secretary may make grants and enter into contracts with public agencies or private organizations or institutions of higher education to support the research and dissemination activities described in paragraphs (4), (5), and (6) of section 300z(b) of this title.

(2) The Secretary may make grants or enter into contracts under this section for a period of one year. A grant or contract under this section for a project may be renewed for four additional one-year periods, which need not be consecutive.

(3) A grant or contract for any one-year period under this section may not exceed $100,000 for the direct costs of conducting research or dissemination[1] activities under this section and may include such additional amounts for the indirect costs of conducting such activities as the Secretary determines appropriate. The Secretary may waive the preceding sentence with respect to a specific project if he determines that—

(A) exceptional circumstances warrant such waiver and that the project will have national impact; or

(B) additional amounts are necessary for the direct costs of conducting limited demonstration projects for the provision of necessary services in order to provide data for research carried out under this subchapter.

(4) The amount of any grant or contract made under this section may remain available for obligation or expenditure after the close of the one-year period for which such grant or contract is made in order to assist the recipient in preparing the report required by subsection (f)(1) of this section.

SCOPE OF PERMISSIBLE ACTIVITIES

(b)(1) Funds provided for research under this section may be used for descriptive or explanatory surveys, longitudinal studies, or limited demonstration projects for services that are for the purpose of increasing knowledge and understanding of the matters described in paragraphs (4) and (5) of section 300z(b) of this title.

---

1 So in original. Probably should be "dissemination".

(2) Funds provided under this section may not be used for the purchase or improvement of land, or the purchase, construction, or permanent improvement (other than minor remodeling) of any building or facility.

APPLICATIONS

(c) The Secretary may not make any grant or enter into any contract to support research or dissemination activities under this section unless—

(1) the Secretary has received an application for such grant or contract which is in such form and which contains such information as the Secretary may by regulation require;

(2) the applicant has demonstrated that the applicant is capable of conducting one or more of the types of research or dissemination activities described in paragragh (4), (5), or (6) of section 300z(b) of this title; and

(3) in the case of an application for a research project, the panel established by subsection (e)(2) of this section has determined that the project is of scientific merit.

COORDINATION WITH NATIONAL INSTITUTES OF HEALTH

(d) The Secretary shall, where appropriate, coordinate research and dissemination activities carried out under this section with research and dissemination activities carried out by the National Institutes of Health.

REVIEW OF APPLICATIONS FOR GRANTS AND CONTRACTS; ESTABLISHMENT OF REVIEW PANEL

(e)(1) The Secretary shall establish a system for the review of applications for grants and contracts under this section. Such system shall be substantially similar to the system for scientific peer review of the National Institutes of Health and shall meet the requirements of paragraphs (2) and (3).

(2) In establishing the system required by paragraph (1), the Secretary shall establish a panel to review applications under this section. Not more than 25 per centum of the members of the panel shall be physicians. The panel shall meet as often as may be necessary to facilitate the expeditious review of applications under this section, but not less than once each year. The panel shall review each project for which an application is made under this section, evaluate the scientific merit of the project, determine whether the project is of scientific merit, and make recommendations to the Secretary concerning whether the application for the project should be approved.

(3) The Secretary shall make grants under this section from among the projects which the panel established by paragraph (2) has determined to be of scientific merit and may only approve an application for a project if the panel has made such determination with respect to such a project. The Secretary shall make a determination with respect to an application within one month after receiving the determinations and recommendations of such panel with respect to the application.

REPORTS

(f)(1)(A) The recipient of a grant or contract for a research project under this section shall prepare and transmit to the Secretary a report describing the results and conclusions of such research. Except as provided in subparagraph (B), such report shall be transmitted to the Secretary not later than eighteen months after the end of the year for which funds are provided under this section. The recipient may utilize reprints of articles published or accepted for publication in professional journals to supplement or replace such report if the research contained in such articles was supported under this section during the year for which the report is required.

(B) In the case of any research project for which assistance is provided under this section for two or more consecutive one-year periods, the recipient of such assistance shall prepare and transmit the report required by subparagraph (A) to the Secre-

tary not later than twelve months after the end of each one-year period for which such funding is provided.

(2) Recipients of grants and contracts for dissemination under this section shall submit to the Secretary such reports as the Secretary determines appropriate.

COLLECTION OF SURVEY DATA USED PRIMARILY FOR GENERATION OF NATIONAL POPULATION ESTIMATES

(g) In carrying out functions relating to the conduct and support of research under this section, the Secretary shall not be subject to the provisions of chapter 35 of Title 44, except with respect to the collection of survey data which primarily will be used for the generation of national population estimates.

(July 1, 1944, c. 373, Title XX, § 2008, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 589.)

§ 300z-8. Evaluation and administration

(a) Of the funds appropriated under this subchapter, the Secretary shall reserve not less than 1 per centum and not more than 3 per centum for the evaluation of activities carried out under this subchapter. The Secretary shall submit to the appropriate committees of the Congress a summary of each evaluation conducted under this section.

(b) The officer or employee of the Department of Health and Human Services designated by the Secretary to carry out the provisions of this subchapter shall report directly to the Assistant Secretary for Health with respect to the activities of such officer or employee in carrying out such provisions.

(July 1, 1944, c. 373, Title XX, § 2009, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-9. Authorization of appropriations

(a) For the purpose of carrying out this subchapter, there are authorized to be appropriated $30,000,000 for the fiscal year

ending September 30, 1982, $30,000,000 for the fiscal year ending September 30, 1983, and $30,000,000 for the fiscal year ending September 30, 1984.

(b) At least two-thirds of the amounts appropriated to carry out this subchapter shall be used to make grants for demonstration projects for services.

(c) Not more than one-third of the amounts specified under subsection (b) of this section for use for grants for demonstration projects for services shall be used for grants for demonstration projects for prevention services.

(July 1, 1944, c. 373, Title XX, § 2010, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 591.)

§ 300z-10. Restrictions

(a) Grants or payments may be made only to programs or projects which do not provide abortions or abortion counseling or referral, or which do not subcontract with or make any payment to any person who provides abortions or abortion counseling or referral, except that any such program or project may provide referral for abortion counseling to a pregnant adolescent if such adolescent and the parents or guardians of such adolescent request such referral; and grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.

(b) The Secretary shall ascertain whether programs or projects comply with subsection (a) of this section and take appropriate action if programs or projects do not comply with such subsection, including withholding of funds.

(July 1, 1944, c. 373, Title XX, § 2011, as added Aug. 13, 1981, Pub.L. 97-35, Title IX, § 955(a), 95 Stat. 592.)

EXHIBIT B

TITLE VI—GRANT PROGRAM

FINDINGS AND PURPOSES

SEC. 601. (a) The Congress finds that—

(1) adolescents are at a high risk of unwanted pregnancy;

(2) in 1975, almost 1,000,000 adolescents became pregnant and nearly 600,000 carried their babies to term;

(3) pregnancy and childbirth among adolescents, particularly young adolescents, often results in severe adverse health, social, and economic consequences, including: a higher percentage of pregnancy and childbirth complications; a higher incidence of low-birth-weight babies; a higher frequency of developmental disabilities; higher infant mortality and morbidity; a decreased likelihood of completing schooling; a greater likelihood that adolescent marriage will end in divorce; and higher risks of unemployment and welfare dependency;

(4) an adolescent who becomes pregnant once is likely to experience rapid repeat pregnancies and childbearing, with increased risks;

(5) the problems of adolescent pregnancy and parenthood are multiple and complex and are best approached through a variety of integrated and essential services;

(6) such services, including a wide array of educational and supportive services, often are not available to the adolescents who need them, or are available but fragmented and thus of limited effectiveness in preventing pregnancies and future welfare dependency; and

(7) Federal policy therefor should encourage the development of appropriate health, educational, and social services where they are now lacking or inadequate, and

the better coordination of existing services where they are available in order to prevent unwanted early and repeat pregnancies and to help adolescents become productive, independent contributors to family and community life.

(b) Therefore, the purposes of this Act are—

(1) to establish better coordination, integration, and linkages among existing programs in order to expand and improve the availability of, and access to, needed comprehensive community services which assist in preventing unwanted initial and repeat pregnancies among adolescents, enable pregnant adolescents to obtain proper care and assist pregnant adolescents and adolescent parents to become productive independent contributors to family and community life, with primary emphasis on services to adolescents who are 17 years of age and under and are pregnant or who are parents;

(2) to expand the availability of such services that are essential to that objective; and

(3) to promote innovative, comprehensive, and integrated approaches to the delivery of such services.

DEFINITIONS

SEC. 602. For the purposes of this Act, the term—

(1) "Secretary" means the Secretary of the Department of Health, Education, and Welfare;

(2) "eligible person" means—

(A) with regard to the provision of all necessary core services and such necessary supplemental services as may be available, a pregnant adolescent or an adolescent parent; or

(B) with regard to the provision of the services described in paragraphs (4)(A), (4)(B), and (4)(G)

and referral to such other services which may be appropriate, a nonpregnant adolescent;

(3) "eligible grant recipient" means a public or nonprofit private organization or agency which demonstrates, to the satisfaction of the Secretary, the capability of providing in a single setting all core services or the capability of creating a network through which all core services would be provided;

(4) "core services" means those services which shall be provided by all grantees which are—

(A) pregnancy testing, maternity counseling, and referral services;

(B) family planning services, except that such services for nonpregnant adolescents shall be limited to counseling and referral unless suitable and appropriate family planning services are not otherwise available in the community;

(C) primary and preventive health services including pre- and post-natal care;

(D) nutrition information and counseling;

(E) referral for screening and treatment of venereal disease;

(F) referral to appropriate pediatric care;

(G) educational services in sexuality and family life (including sex education), and including family planning information;

(H) referral to appropriate educational and vocational services;

(I) adoption counseling and referral services; and

(J) referral to other appropriate health services.

(5) "supplemental services" means those services which may be provided and are—

(A) child care sufficient to enable the adolescent parent to continue her education or to enter into employment;

(B) consumer education and homemaking;

(C) counseling for extended family members of the eligible person;

(D) transportation; and

(E) such other services consistent with the purposes of this Act as the Secretary may approve in accordance with regulations promulgated by the Secretary;

(6) "adolescent parent" means a parent under the age of 21.

AUTHORITY TO MAKE GRANTS

SEC. 603. The Secretary may make grants to further the purposes of this Act to eligible grant recipients which have submitted an application which the Secretary finds meets the requirements of section 606 for projects which the Secretary determines will help communities provide core and supplemental services in easily accessible locations, assure a continuity of services and appropriate assistance, and coordinate, integrate, and establish linkages among such services. Projects shall, as appropriate, provide, supplement, or improve the quality of such services, and in providing services, give primary emphasis to adolescents who are 17 years of age or under and are pregnant or who are parents.

USES OF GRANTS

SEC. 604. (a) Funds provided under this Act may be used by grantees only to—

(1) provide core services to eligible persons;

(2) coordinate, integrate, and provide linkages among providers of core, supplemental, and other services for eligible persons in furtherance of the purposes of this Act;

(3) provide supplemental services where such services are not adequate or not available to eligible persons in the community and which are essential to the care of pregnant adolescents and to the prevention of adolescent pregnancy;

(4) plan for the administration and coordination of pregnancy prevention and pregnancy-related services for adolescents (including family life and sex education), which will further the objectives of this Act; and

(5) fulfill assurances required for grant approval by section 606.

(b) Grantees shall charge fees for services only pursuant to a fee schedule, approved by the Secretary as a part of the application described in section 606, which bases fees charged by the grantee on the income of the eligible person or the parents or legal guardians of the eligible person and takes into account the difficulty adolescents face in obtaining resources to pay for services. In no case may a grantee discriminate with regard to the provision of services to any individual because of that individual's inability to provide payment for such services.

PRIORITIES, AMOUNTS, AND DURATION OF GRANTS

SEC. 605. (a) In approving applications for grants under this Act, the Secretary shall give priority to applicants who—

(1) serve an area where there is a high incidence of adolescent pregnancy;

(2) serve an area where the incidence of low-income families is high and where the availability of pregnancy-related services is low;

(3) show evidence of having the ability to bring together a wide range of needed care and, as appropriate, supplemental services in comprehensive single-site projects, or to establish a well-integrated network of such services (appropriate for the target population and geographic area to be served including the special needs of rural areas) for adolescents at risk of initial or repeat pregnancies;

(4) will utilize to the maximum extent feasible, existing available programs and facilities such as neighborhood and primary health care centers, family planning clinics, children and youth centers, maternal and infant health centers, regional rural health facilities, school and other educational programs, mental health programs, nutrition programs, recreation programs, and other ongoing pregnancy prevention and pregnancy-related services;

(5) make use, to the maximum extent feasible, of other Federal, State, and local funds, programs, contributions, and other third-party reimbursements;

(6) can demonstrate a community commitment to the program by making available to the project non-Federal funds, personnel, and facilities; and

(7) have involved the community to be served, including public and private agencies, adolescents, and families, in the planning and implementation of the project.

(b)(1) The amount of a grant under this Act shall be determined by the Secretary, based on factors such as the incidence of adolescent pregnancy in the geographic area to be served, and the adequacy of pregnancy prevention and pregnancy-related services in the area to be served.

(2) In making grants under this Act, the Secretary shall consider the special needs of rural areas and, to the maximum extent practicable, shall distribute funds in consideration of the relative number of adolescents in such areas in need of such services.

(c)(1) A grantee may not receive funds under this Act for a period in excess of 5 years.

(2) Subject to paragraph (3), a grant made under this Act may not exceed 70 percent of the costs of a project assisted under this Act for the first and second years of the project. In each year succeeding the second year of the project the amount of the Federal grant under this Act shall decrease by no less than 10 percent of the amount of the Federal grant under this Act in the preceding year.

(3) The Secretary may waive the limitation specified in paragraph (2) in any year in accordance with criteria established by regulation.

REQUIREMENTS FOR GRANT APPROVAL

SEC. 606. (a) An application for a grant under this Act shall be in such form and contain such information as the Secretary may require, and shall include—

(1) an identification of the incidence of adolescent pregnancy and related problems;

(2) a description of the economic conditions and income levels in the geographic area to be served;

(3) a description of existing pregnancy prevention and pregnancy-related services (including family life and sex education), and including where, how, by whom and to whom they are provided, and the extent to which they are coordinated in the geographic area to be served;

(4) a description of the major unmet needs for services for adolescents at risk of initial or repeat pregnancies, the number of adolescents currently served in the area, and the number of adolescents not being served in the area;

(5) a description of how all of the core services will be provided in the project using funds under this Act or otherwise provided by the grantee, to whom they will be provided, how they will be coordinated, integrated, and

linked with other related programs and services and the source or sources of funding of such core services;

(6) a description of how adolescents needing services other than those provided directly by the grantee will be identified and how access and appropriate referral to those services (such as medicaid; public assistance; employment services; child care services for adolescent parents; and other city, county, and State programs related to adolescent pregnancy) will be provided including a description of the plan to coordinate such services with activities funded under this Act;

(7) a description of any fee schedule to be used for any services provided directly by the grantee and the method by which it was derived, together with assurances that the applicant will make every reasonable effort to collect reimbursement for its costs in providing services to persons who are entitled to have payment made on their behalf for such services under any Federal or other government program or private insurance program;

(8) a description of the grantee's capacity to continue services as Federal funds decrease and in the absence of Federal assistance;

(9) a description of the results expected from the provision of services and activities, and the procedures to be used for evaluating those results;

(10) a summary of the views of public agencies, providers of services, and the general public in the geographic area to be served, of the proposed use of the funds provided under a grant provided under this Act and a description of procedures used to obtain those views, and, in the case of applicants who propose to coordinate services administered by a State, the written comments of the appropriate State officials responsible for such services;

(11) assurances that the applicant will have an ongoing quality assurance program;

(12) assurances that the applicant shall have a system for maintaining the confidentiality of patient records in accordance with regulations promulgated by the Secretary;

(13) assurances that the applicant will demonstrate its financial responsibility by the use of such accounting procedures and other requirements as may be prescribed by the Secretary;

(14) assurances that the applicant (A) has or will have a contractual or other arrangement with the agency of the State, in which it provides services, which administers or supervises the administration of a State plan approved under title XIX of the Social Security Act for the payment of all or a part of the applicant's costs in providing health services to persons who are eligible for medical assistance under such a State plan, or (B) has made or will make every reasonable effort to enter into such an arrangement;

(15) assurances that the applicant has made or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing health services to persons who are entitled to benefits under title V of the Social Security Act, to medical assistance under a State plan approved under title XIX of such Act, or to assistance for medical expenses under any other public assistance program or private health insurance program;

(16) assurances that the applicant has or will make and will continue to make every reasonable effort to collect appropriate reimbursement for its costs in providing services to persons entitled to services under title XX of the Social Security Act;

(17) assurances that the applicant (A) has prepared a schedule of fees or payments for the provision of its

services designed to cover its reasonable costs of operation and a corresponding schedule of discounts to be applied to the payment of such fees or payments, which discounts are adjusted on the basis of the patient's ability to pay, (B) has made and will continue to make every reasonable effort (i) to secure from patients payment for services in accordance with such schedules, and (ii) to collect reimbursement for health or other services on the basis of the full amount of fees and payments for such services without application of any discount, and (C) has submitted to the Secretary such reports as he may require to determine compliance with this paragraph;

(18) assurances that the applicant will make maximum use of funds available under title X of the Public Health Service Act;

(19) assurances that the acceptance by any individual of family planning services or family planning or population growth information (including educational materials) provided through financial assistance under this title shall be voluntary and shall not be a prerequisite to eligibility for or receipt of any other service furnished by the applicant;

(20) assurances that fees collected by the applicant for services rendered in accordance with this Act shall be used by the applicant to further the purposes of this Act;

(21) assurances that unemancipated minors requesting services from the applicant will be encouraged, whenever feasible, to consult with their parents with respect to such services;

(22) assurances that all pregnant adolescents receiving services will be informed of the availability of counseling (either by the entity providing core services or through a referral agreement with such other entity which provides such counseling) on all options, regarding her pregnancy;

(23) assurances that primary emphasis for services paid for with funds under this Act shall be given to pregnant adolescents and adolescent parents 17 and under who are not able to obtain needed assistance through other means; and

(24) assurances that funds received under this Act shall not supplant funds received from any other Federal, State, or local program or any private sources of funds.

(b) Each grantee which participates in the program established by this title shall make such reports concerning its use of Federal funds as the Secretary may require. Reports shall include the impact the project has had on reducing the rate of first and repeat pregnancies among adolescents, and the effect on factors usually associated with welfare dependency.

(c) The Secretary shall provide the Governor of each State copies of applications received for grants under this Act from applicants within such State. The Governor shall have a period of 60 days from receipt of such copies to review and submit comments to the Secretary.

(d) No application submitted for a grant under this Act may be approved unless the Secretary is satisfied that core services shall be available through the grantee within a reasonable time after such grant is received.

AUTHORIZATION OF APPROPRIATIONS

SEC. 607. For the purpose of carrying out this title, there are authorized to be appropriated $50,000,000 for the fiscal year ending September 30, 1979, $65,000,000 for the fiscal year ending September 30, 1980 and $75,000,000 for the fiscal year ending September 30, 1981.

FUND RESTRICTION

SEC. 608. No funds for grants made under the provisions of this Act may be used for payment for the performance of an abortion.

[THIS PAGE INTENTIONALLY LEFT BLANK]

FRAMEWORK FOR THIS COURT FOR CASES INVOLVING AID TO RELIGIOUS INSTITUTIONS DECIDED UNDER THE *LEMON* "EFFECTS" TEST*

* This chart does not include cases involving state subsidization of what are essentially private choices by *individuals*, such as was the case in *Mueller v. Allen*, 463 U.S. 388 (1983), and *Witters v. Washington Dept. of Servs. for the Blind*, 106 S.Ct. 748 (1986).

BEST AVAILABLE COPY

EXHIBIT D

PROPOSED ORDER OF THE ADOLESCENT PREGNANCY PREVENTION AND PREGNANCY SERVICES BOARD ADOPTING RULES*

To adopt APP 1, relating to grants for prevention of adolescent pregnancy.

Analysis Prepared by the Adolescent Pregnancy Prevention and Pregnancy Services Board

These are rules for the grant program administered by the Adolescent Pregnancy Prevention and Pregnancy Services Board under s. 46.93, Stats. Grants are awarded by the Board to stimulate development of and to support programs and services aimed at reducing the incidence of adolescent pregnancy and the adverse consequences of adolescent pregnancy. The grants are announced through a Request for Proposal (RFP) process and are awarded by means of a contract between the Board and each successful applicant following preliminary review of applications to identify those that are eligible for evaluation and final review to first identify applications that are eligible for funding and then to distinguish relatively more promising from relatively less promising applications. The Board's rules cover policies and procedures related to applying for a grant, the selection process, appeal of an adverse decision and restrictions on use of grant monies.

The Adolescent Pregnancy Prevention and Pregnancy Services Board approved these proposed rules on November 3, 1987.

---

* The rules contained in this order took effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.11(2), Stats. Wis. Stat. Ann. § 46.93 (West 1987), as amended by 1987 Wis. Act 27, § 863br, reprinted in Wis. Legis. Serv. No. 2, at 207 (West 1987).

The Board's authority to adopt these rules is found in ss. 46.93(2) and 227.11(2)(a), Stats. The rules interpret s. 46.93, Stats.

SECTION 1. APP 1 is created to read:

CHAPTER APP 1
ADOLESCENT PREGNANCY PREVENTION PROJECTS

APP 1.01 Authority and purpose
APP 1.02 Applicability
APP 1.03 Definitions
APP 1.04 Project eligibility
APP 1.05 Application
APP 1.06 Restrictions
APP 1.07 Selection

APP 1.01 AUTHORITY AND PURPOSE. This chapter is promulgated under the authority of ss. 46.93 and 227.11(2)(a), Stats., for the purpose of establishing criteria, procedures, requirements and conditions for the award of project grants from the appropriation under s. 20.434(1)(b), Stats., to organizations that operate or propose to operate programs aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

APP 1.02 APPLICABILITY. This chapter applies to the adolescent pregnancy prevention and services board, to applicants for grants awarded by the board, and to organizations that have been awarded grants by the board.

APP 1.03 DEFINITIONS. In this chapter:

(1) "Adolescent" means a young person between the ages of 10 and 18 years old.

(2) "Adolescent pregnancy prevention and services board" means the 13-member adolescent pregnancy prevention and pregnancy services board established under s. 15.195(5), Stats., to carry out the responsibility set out in s. 46.93(2), Stats., namely, to award grants to applicant organizations for adolescent pregnancy prevention programs and pregnancy-related supportive services.

(3) "Applicant" means an organization that applies for a grant from the adolescent pregnancy prevention and services board to operate a program aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

(4) "Board" means the adolescent pregnancy prevention and services board.

(5) "Continuation grant" means a grant awarded by the board to an applicant who received an initial grant for the current funding year and who proposes to continue to operate the same program or that program as modified in consultation with the board in the new funding year.

(6) "Evaluation committee" means a committee of board members and other persons invited by board members which reviews, evaluates, and scores applications.

(7) "Funding year" means the 12-month period beginning July 1.

(8) "Grant" means a monetary award made by the board from the appropriation under s. 20.434(1)(b), Stats., to an applicant to help establish or support a program aimed at reducing the incidence or adverse consequences of adolescent pregnancy.

(9) "Initial grant" means a grant awarded for the first time to an applicant.

(10) "Nonprofit corporation" has the meaning prescribed in s. 46.93(1m)(c), Stats., namely, a nonstock, nonprofit corporation organized under ch. 181, Stats.

(11) "Public agency" has the meaning prescribed in s. 46.93(1m)(e), Stats., namely, a county, city, village, town or school district, an agency of Wisconsin state government or an agency of a county, city, village, town or school district.

(12) "Religiously affiliated organization" means an organization that is affiliated with a religious order or doctrine.

(13) "Pervasively sectarian organization" means a religiously affiliated organization in which a substantial portion of its functions are subsumed in a religious mission. This would include parochial schools, churches, and synagogues.

An applicant shall be determined to be a pervasively sectarian organization if it meets any of the following criteria, unless the applicant's mission statement, bylaws or charter state that the applicant's purpose is secular in nature and free of religious doctrine or control:

1. The governing board or staff of the applicant are answerable to a religious authority;
2. The stated purpose of the applicant has a religious mission;
3. The applicant requires that the majority of its governing board be of a specific religious orientation;
4. A ruling percentage of an applicant is owned and operated by a religious organization;
5. The referral, counseling and/or teaching activities of the applicant are restricted to the religious doctrine of that organization;
6. The applicant has a statement prohibiting certain activities due to religious doctrine;
7. The applicant has a requirement that employees must have a particular religious orientation or preference is given to hiring persons with a particular religious orientation.

(14) Request for proposals (RFPs) means a document that describes a grant program, invites applications and specifies who may apply, application procedures, criteria for awarding grants and conditions and restrictions that accompany grant awards.

APP 1.04 PROJECT ELIGIBILITY. (1) The board shall fund projects that have prevention of adolescent pregnancies as their major goal. The board may also fund projects that provide health care, education, counseling, vocational training and other supportive services to adolescents who are pregnant.

(2) The board may limit funding to projects which provide services in counties which the board has targeted based on the counties' adolescent fertility rates or the number of births to adolescents in the counties.

(3) No organization that will have a continuation grant may receive funds under an RFP to provide services in that funding year in the county or counties in which the continuation grant project is located; and

(4) No organization may have more than two grants from the board at one time.

APP 1.05 APPLICATION. (1) WHO MAY APPLY. (a) An applicant shall be:

1. A public agency;

2. A nonprofit corporation;

3. A coalition of organizations under the auspices of a public agency or nonprofit corporation; or

4. The tribal governing body of a federally recognized Wisconsin tribe or band of Indians, or an American Indian organization appointed by the tribal governing body.

(b) A religiously affiliated organization may apply for funds. However, the APPS Board will make a factual determination as to whether the applying organization is determined to be pervasively sectarian and if the organization is determined to be pervasively sectarian it will not be eligible for funding.

(2) SOLICITATION. (a) The board shall solicit applications for grants, except continuation grants, by preparing one or more RFPs, publishing a legal notice regarding the availability of an RFP at least twice in the official state newspaper no later

than six weeks before the application deadline, and distributing copies of the RFP on request.

(b) The board shall solicit applications for continuation grants from currently funded organizations.